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IN THE

Supreme Court of the United States

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,
Petitioner,

ARTHUR BEN LEWIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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GENERAL DOCKET
United States Court of Appeals
for the
Sixth Circuit

Case No. 72-1679

Date 1972		FILINGS—PROCEEDINGS
June	14	Motion to Appeal in Forma Pauperis and for appointment of counsel
July	10	*Certified record* (3 vols. of pleadings and transcript and 5 vols. of state court transcript), filed; and cause docketed
July	17	*Certified supplemental record* (2 vols. of pleadings), filed
July	17	Appearance of Counsel for Appellant
July	17	Motion for appointment of counsel, memorandum in support thereto, with proof of service
July	17	Appearance of counsel for Appellee

August	9	Order granting appointment of counsel for Appellee (Celebrezze, J.) U-52
August	21	Twenty-five copies of Brief for Appellant, with proof of service
August	21	Ten copies of Appendix for Appellant
September	8	*Certified Supplemental Record* (1 vol. pleadings)
September	15	Motion: Appellee's brief to 10-2-72 (Granted. Final extension)
October	2	Four copies of Brief for Appellee, with proof of service
December	8	Cause argued and submitted (Before: Phillips, Weick and Miller, J.)
January	5	Order appointing counsel for Appellee
April	5	Judgment of the District Court affirmed X-15
April	5	Opinion by Miller, J.
April	27	Motion of Appellant for stay of mandate
April	27	Letter from counsel for Appellant requesting preparation of record for Supreme Court
May	2	Voucher for compensation and expenses of appointed counsel mailed to Administrative Office and copy to counsel
May	3	Certified record for certiorari mailed to Supreme Court
May	15	Order staying mandate thirty days (Phillips, Weick and Miller, J.) Y-2
June	4	Notice of filing petition for certiorari on 5/30/73 (Sup. Ct. 72-1603)
August	22	Motion of Appellee for bond, with proof of service
September	5	Order denying motion of Appellee for bail (Miller, J.) Z-5

September 5 Copy of above order issued to Clerk of the District Court

December 7 Certified copy of order of Supreme Court granting certiorari 12/3/73

IN THE COURT OF COMMON PLEAS

OF DELAWARE COUNTY, OHIO

Case No. 3952

THE STATE OF OHIO,

Plaintiff,

ARTHUR BEN LEWIS, JR.,

Defendant.

TRANSCRIPT OF TESTIMONY

Before O. W. Whitney, Jr., Judge, on Thursday, January 25, 1968.

Appearances:

Mr. R. Kenneth Kunkel, Prosecuting Attorney, and Mr. David R. Kessler, Special Assistant Prosecuting attorney, on behalf of the Plaintiff, the State of Ohio.

Mr. Paul A. Scott, on behalf of the Defendant, Arthur Ben Lewis, Jr.

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Witnesses:

CYLDE MANN

Called as a witness, by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Cross Examination

By Mr. Scott:

Q. Would you state your name, please? A. Clyde Mann.

Q. And your present address? A. Dublin, Ohio, Route 1.

Q. Mr. Mann, with whom are you associated? A. With the Division of Criminal Activities, Attorney General's Office.

Q. And in what capacity do you so serve? A. Chief investigator.

Q. And were you so employed and serving in that capacity on October 10, 1967? A. I Was.

Q. As chief investigator for the Attorney General's staff, are you a police officer? A. Not a so-called police officer. No police powers.

Q. Now, Mr. Mann, directing your attention to the late afternoon of October 10, 1967, at the office of the Attorney General, Criminal Activities Division, were you present, at that time? [4] A. Yes.

Q. And would you state for the record who else was present; either there, or in the office at that time that had any contact with Mr. Ben Lewis. A. Sergeant Lavery and James Heise.

THE COURT: Would you spell that last name?

THE WITNESS: H-e-i-s-e.

THE COURT: Thank you. Go ahead. A. Mr. Kessler, Ed James.

Q. Is that basically all who were there? A. Well, Mr.

Scott—yourself, was there. Mr. Tingley was there later on that day.

Q. And of course, Mr. Lewis? A. Mr. Lewis.

Q. Now, Mr. Ed James is whom? A. He is a legal aide with the Attorney General's Office.

Q. He is not a police officer? A. No.

Q. Mr. Kessler, I assume we can take notice that he is the attorney and chief of this Division? A. That is correct.

Q. Mr. Heise, James Heise, who is Mr. Heise? A. He is employed in the same division as an investigator. [5]

Q. In the same capacity as you are, only you are the Chief of Investigation? A. That is correct.

Q. And Sergeant William Lavery, he is a duly authorized acting police officer for the County of Delaware, Sheriff's Department; is that right? A. That is correct.

Q. Now, at that time, Mr. Mann, the subject matter that was under investigation, at that time, was an alleged murder that took place on or about July 19, 1967; is that correct? A. That is correct; yes.

Q. And the time that we are speaking about at the present was in the offices of the Attorney General, that took place on October 10, 1967? A. Yes.

Q. Mr. Mann, could you tell me when you first entered into the investigation of this particular crime? A. Sometime in the latter part of August.

Q. Now, were you present when Sergeant Lavery served the warrant of arrest on Arthur Ben Lewis? A. Yes.

Q. And did that take place in the office of Mr. David Kessler? A. His office, or in the hallway just outside the office. [6]

Q. Mr. Mann, after Mr. Lewis was apprehended and

arrested, did you have any conversation with Mr. Lewis concerning a file that he had in his possession, and his automobile? A. Yes.

Q. Now, this was after he was arrested? A. No, before.

Q. After he was arrested did you make a demand upon Mr. Lewis for his automobile and his file?

MR. KESSLER: I object.

THE COURT: Go ahead.

MR. KESSLER: Mr. Scott keeps bringing up about a file. This is a motion as to the automobile, and the file has nothing to do with it. And subsequently, I will object to any questions or answers regarding a file.

THE COURT: Counsel for the Defendant asked that the Court hear these motions separately. Now, the Court is going to try to do it. Where is the file pertinent here, Mr. Scott?

MR. SCOTT: Well, as it relates to the context. If I ask the question about did you have a conversation about an automobile, the answer can be no, I had a conversation with him about an automobile and a file.

MR. KESSLER: May it please the [7] Court.

I am sorry. Go ahead.

MR. SCOTT: In many instances, I have been cautious in the manner which my questions are asked to Mr. Mann, because they require explicit questioning rather than vague generalities.

THE COURT: You aren't indicating to this Court that law enforcement officers or an employee of the Attorney General's Office would say that he hadn't talked about a car if he actually talked about a car and a file? Do you take that position here?

If that witness takes that position, he'd better not.

MR. SCOTT: All right. We can eliminate the file completely.

THE COURT: All right. Thank you.

Q. Did you have a conversation, or did you make a demand upon Ben Lewis, after he was arrested, for the automobile? A. Yes.

Q. What did you say to him? A. I don't know if I asked him for the car—I stated that I was going to impound the car because it was used in a felony. That was the time you was present, when this statement [8] was made.

Q. Did you, at that time, Mr. Mann, have a search warrant for the automobile of Arthur Ben Lewis? A. No.

Q. The statement that you have indicated that you are going to impound the car because it was used in the commission of a felony, did that statement come as a result of a question from myself? A. At that time, no, not that I recall.

Q. Did you have any conversation with the undersigned as it related to the automobile inquiring as to what authority do you have in taking this car? A. Did you ask me that question?

Q. Yes, sir. A. I don't recall you asking me that question.

Q. Pardon? A. I don't recall you asking me that question. If you did, the only thing I remember saying to you, at that time, was this car was being impounded because it was used in a felony.

Q. All right. Do you recall any other conversations that you had with me concerning that automobile after the arrest was made by Sergeant Lavery? A. I don't exactly know just what you mean.

Q. Well, as it pertains to the seizure of the automobile. A. Nothing further, that I recall. [9]

Q. Mr. Mann, was the automobile, in fact, impounded as the results of this particular incident? A. Yes.

Q. And did you cause it to be impounded? A. Well, if you mean me direct, it was a talk between Sergeant Lavery, myself and Mr. Kessler. From our talk between the three of us, from that effect, it was impounded.

Q. Are you inferring, in any way, that Sergeant Lavery had anything to do with the impounding of this automobile? A. Yes.

Q. You are? A. Yes.

Q. Did you, at any time, ever observe—strike that.

Were you, at any time, working under any type of instructions from Sergeant Lavery, as to the impounding of that automobile? A. It was his suggestion that this car should be impounded because it was used in a felony.

Q. It was his suggestion? A. Well, between all of us talking it over.

Q. No, I am talking about Sergeant Lavery. Are you telling me that it was his suggestion, or that you were working under his explicit orders to impound that car, or were you working under your own determination? A. It was a mutual agreement between both of us. [10]

Q. Did he do anything to impound the vehicle or consumate the seizure of that vehicle; Lavery, himself? A. No. The Columbus Police Department was called to actually pick up the car.

Q. And who called the Columbus Police Department? A. I believe Mr. Heise made the call to the Police Department.

Q. So the answer to the question would be no, you were not acting under orders of Sergeant Lavery on the seizure of the automobile? A. No, I was not acting on orders.

MR. SCOTT: I think that is all I have, Mr. Mann.

THE COURT: All right.

MR. KESSLER: Just a couple of questions, Your Honor, if I could.

Direct Examination

By Mr. Kessler:

Q. Did you have any conversation, Mr. Mann, with the Defendant regarding a request by him to take his car and put it someplace? A. Yes; I did.

Q. And what was that conversation? What did the Defendant say, in other words? [11] A. He asked me to have his car impounded, or put in a police lot for safe keeping, because the lot that he had it in, which was next door to our office, he didn't want it to sit there over night, afraid somebody would ramsack the car, and take any merchandise that he had in the car out of the car. He asked me to have it impounded for safe keeping.

Q. Now, Mr. Mann, did you, in your own mind, feel that this car had been used in an alleged felony? A. Yes.

MR. KESSLER: That is all.

THE COURT: Mr. Scott.

Recross Examination

By Mr. Scott:

Q. Mr. Mann, the conversation that you are talking about as it relates to Mr. Lavery, was prior to the time of the arrival of his counsel; is that correct?

I wasn't there when that conversation took place, was I? A. No.

Q. In fact, after I arrived there, you had no direct conversation with Mr. Lewis at all, did you? A. No, no.

Q. He was not under arrest, at that time, was he? A. The warrant had not been served on him at that time, [12] no.

Q. In fact, you had never disclosed to him that he was going to be arrested, at that time, had you? A. Yes.

Q. When did you dislose that to him? A. That was after he made a call to you, or Mr. Tingley, I don't know which.

Q. All right. But the conversation concerning the automobile was even before he had made a call to his attorney; is that correct? A. This I don't recall exactly.

Q. Well, now, Mr. Mann, getting specific about this, you seized the automobile because you felt that it was used in the commission of a felony; is that correct? A. That is correct.

Q. And that is the authority which you exercised the seizure of that automobile? A. That is correct.

MR. SCOTT: That is all.

THE COURT: Anything else, Mr. Kessler?

MR. KESSLER: Nothing, Your Honor.

THE COURT: This Court, perhaps, has a right to take some note of the fact [13] that this witness has had some experience in the field of law enforcement, and this Judge would be, I am certain, correct in assuming that depositions, and other information that you attorneys have available, shows that this man has had some experience in the field of law enforcement.

In view of the Court's remarks earlier in this record as to what this Court would or would not expect to hear in the way of answers, how many years experience did you have with some of the law enforcement authorities in Franklin County, Ohio?

THE WITNESS: Approximately 18 years.

THE COURT: And that was just prior to going with the Attorney General's Office, here?

THE WITNESS: Yes, sir.

THE COURT: Anything else, Mr. Scott?

MR. SCOTT: No, sir.

THE COURT: Mr. Kessler?

MR. KESSLER: No, sir.

THE COURT: Thank you, sir.

(Witness excused.)

THE COURT: Would you want to [14] have the Bailiff ascertain whether or not Mr. Lavery is here?

MR. SCOTT: Yes, sir.

THE COURT: Would you check, please, sir.

THE BAILIFF: He has not shown up yet, Your Honor.

THE COURT: Mr. Scott, the Bailiff reports that he has not arrived here yet. Do you want a recess?

Off the record. (Discussion had off the record.)

THE COURT: Back to your record.

DAVID E. TINGLEY

Called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Would you state your name for the record? A. David W. Tingley.

Q. And your address? A. 1856 Willow Forge Drive.

Q. Your profession? [15] A. Attorney at law.

Q. Licensed to practice in the State of Ohio? A. Yes, sir.

Q. Mr. Tingley, did you observe and witness the facts surrounding the seizure of Arthur Ben Lewis' Pontica automobile? A. I was not physically present at the actual seizure. I witnessed the events by which the authorities there obtained possession of the keys and the parking ticket of the automobile.

Q. All right. Now, in particularly, where did this take place? A. In the office of the Attorney General in the University Building. I believe it is 40 South Third.

Q. And what date did this take place? A. I do not remember the date of the arrest.

Q. Would it be at that time when Mr. Kessler, Sergeant William Lavery, Jim Heise, Ed James, myself and you were present and Mr. Lewis was there at the Attorney General's office? A. It was.

Q. Would that be October 10, 1967, to the best of your recollection? A. I believe so.

Q. Would you relate to the Court those events that took place as it relates to the seizure of the automobile? A. It was about 5:30. The arrest of Mr. Lewis had been made by Sergeant Lavery. Ben Lewis was in custody. At the [16] time we were about to depart, Clyde Mann indicated to you that he wanted possession of some books and records that Mr. Lewis apparently brought with him, and the automobile. You indicated to Mr. Mann that the books and records — that you had been employed —

MR. KESSLER: May it please the Court, again, I know Mr. Tingley wasn't in here to see the Court's previous ruling, but I will again make an objection as to the books and records.

THE COURT: Mr. Scott, do you care to be heard?

MR. SCOTT: No.

THE COURT: Sustained.

What the Court had indicated, in view of the procedure here, Mr. Tingley, insofar as possible, this would be confined, at the present time, to the evidentary matters pertinent to the Pontiac automobile.

A. All right, sir.

Among other things that Clyde Mann demanded possession of, was the automobile that Mr. Lewis had apparently driven downtown that day.

He said to you, Mr. Scott, again, among the things that he requested, "I want the automobile."

You asked him under what authority he wanted the automobile, and he said, "It was used in the commission of a [17] felony."

You said words to the effect, "I am not going to enter into a physical fight with you here if you are taking custody of the automobile. Here are the keys."

And you got the parking ticket from Mr. Lewis and gave it to Clyde, as I remember.

MR. SCOTT: You may inquire.

THE COURT: Go ahead, sir.

Cross Examination

By Mr. Kessler:

Q. The only question I have, just to clarify everything, you represented Mr. Lewis; is that correct. A. I represented him for years prior to the arrest.

Q. And on that particular day, to clarify how you were there, he had called you? A. He had called me. And I explained to him, aside from the fact that I was a personal friend, and was, at that time, a part-time member of the Franklin County Prosecutor's staff, that I could not represent him in the defense of a criminal action.

MR. KESSLER: All right. That is all, Your Honor.

MR. SCOTT: Thank you, Dave.

THE COURT: Thank you, gentlemen. [18]

In fairness to the witness, who left the stand, the Court is going to try to help you out time-wise, is he released now, or is he to remain?

MR. TINGLEY: Judge, I am not due back in Columbus until 1:00.

MR. KESSLER: We have no reason why he might remain.

THE COURT: Mr. Scott, do you have any reason why he should remain?

MR. SCOTT: No, Your Honor.

THE COURT: As far as the Court is concerned, you may remain here in the courtroom as a spectator, or you may go back to Columbus and practice law.

MR. TINGLEY: Thank you, sir. (Witness excused.)

THE COURT: The Bailiff will check again for you.

Mr. Fees?

THE BAILIFF: Yes, sir, he is not here. I have been watching.

THE COURT: Mr. Scott, would the Court be correct in assuming that you do want Deputy Lavery next?

MR. SCOTT: Yes, Your Honor. [19] I feel that it is material.

THE COURT: We will then recess until he arrives.

(Short recess.)

THE COURT: You may be seated, ladies and gentlemen.

Mr. Kessler, go ahead, sir.

MR. KESSLER: We want to apologize to the Court for the delay here. We talked to Sergeant Lavery, and I am sure the Court knows that it is unusual for Sergeant Lavery to be late. He was on a call and got detained.

THE COURT: Thank you for your explanation.

WILLIAM B. LAVERY

A witness called by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Would you state your name, please? A. William B. Lavery.

Q. And where do you reside, Mr. Lavery? A. 39 Spring Street, Delaware, Ohio.

Q. Your present occupation? [20] A. Deputy Sheriff for the County of Delaware, Ohio.

Q. And do you hold any rank or rate? A. Sergeant.

Q. Were you so employed on October 10, 1967? A. Yes; I was.

Q. And at that time, did you happen to be in Columbus, Ohio, in the office of the Attorney General's Criminal Activities Division? A. Yes.

Q. Were you, at that time, armed with a warrant for the arrest of Arthur Ben Lewis, Jr.? A. Yes; I was.

Q. You had previously obtained that warrant on October 10, or the day before? A. I am not sure. I think it was on October 10.

Q. At least sometime in the morning? A. Yes. I recall now. It was on October 10 that I obtained the warrant.

Q. Now, you did serve the warrant on Arthur Ben Lewis, Jr. for the offense as stated in the affidavit, did you not? A. Yes.

Q. Directing your attention to a 1966 automobile, and the seizure of that automobile, did you have anything to do with that part of the transaction? A. Well, I requested, I think it was Mr. Mann, or Mr. [21] Heise — I think Mr. Mann I requested to impound that vehicle. It was parked in a parking lot near the office of the Division of Criminal Activities. And after the arrest was made, I requested, I am sure it was Mr. Mann, to have the vehicle impounded.

Also, as I recall, I think Lewis — Mr. Lewis had asked us to watch the car. He was concerned about it. He didn't want to leave it in that lot. And he asked that we do something with it.

Q. Sergeant Lavery, the conversation that you are talking about between Mr. Lewis and the safe keeping

of the automobile, that was prior to the time that either myself or David Tingley appeared on the scene, was it not? A. I am not sure on that, Mr. Scott.

Q. As a matter of fact, did you have any conversation with Mr. Lewis, at all, after we arrived; Mr. Tingley and myself? A. Well, I spoke to him. I can't recall exactly what may have been said. But I think perhaps I talked to him breifly. I don't think it had to do with the car, however.

Q. Would I be correct in saying that the conversation that you had with Mr. Lewis concerning the safe keeping of his automobile was prior to the time that we arrived? A. Well, I think so, but —

Q. Was Mr. Mann there at this time that you had this conversation with Mr. Lewis? [22] A. Yes.

Q. And that is the only time the subject came up concerning statements, or anything that Mr. Lewis indicated about the safekeeping of his automobile, was when you and Mr. Mann were together? A. Yes.

Q. Okay. Do you remember back on December 19, 1967, here in the courthouse when I was taking your deposition? A. Yes.

Q. Do you remember the question being asked, Page 25, "Did you have anything to do with the automobile part of this transaction?"

Answer: "On October 10?"

Question: "Yes."

Answer: "No."

Do you remember those questions being asked and those answers being given? A. Yes.

Q. Do I understand you correctly now that your testimony is that you had ordered, or had requested that Mr. Mann seize that automobile? A. Well, we — yes, we dis-

cussed it, and decided it should be impounded, in as much as—

Q. Who discussed it? A. As I say, I am sure it was Mr. Mann and myself. [23] And I am not sure if Mr. Heise was there.

Q. But you did not seize the automobile yourself? A. I would say not. I didn't call for the wrecker, or anything like that. We discussed it.

Q. Did you make a request to anybody to take that automobile, other than as you indicated something to Mr. Mann? Did you talk to me about that car? A. No.

Q. Did you talk to Ben Lewis about that car after the arrest had been consumated? A. Not that I recall.

Q. Did you, as an officer of the Franklin — Delaware County Sheriff's Office, did you have in your possession a search warrant? A. No.

Q. For the taking of that 1966 automobile? A. No.

Q. Do you recall any conversation that took place between Mr. Mann and myself as to the authority under which he was seizing that automobile after the arrest had been made? A. I don't recall it, no.

Q. Under what authority did you order Mr. Mann to take the car? A. We discussed it, and I think we mutually agreed.

Q. But you did not order it, as such? [24] A. I don't recall putting it in the form of an order, but we mutually agreed, and I guess you could say that I requested that it be impounded.

Q. You were the only police officer present, were you not? A. Yes.

Q. In your discussions, under what authority did you discuss about taking that automobile?

MR. KESSLER: Your Honor, I object to that. I think that is within the province of the Court to determine as

a result of the testimony presented today. You are asking for a legal conclusion from the witness.

THE COURT: Mr. Scott, do you care to be heard?

MR. SCOTT: I think, surely, the police officers, on taking personal property belonging to other parties, he has admitted discussing and I would like to know under what authority he did take the automobile.

THE COURT: Isn't the question before the Court, whether he had authority?

MR. SCOTT: Well, I suppose so.

THE COURT: Sustained. Ask another question.

Q. I further understand, Sergeant Lavery, that you had [25] nothing else to do with this automobile, other than what you have just related, as it relates to the seizure of the car? A. That is correct.

MR. SCOTT: All right. That is all.

MR. KESSLER: No questions, Your Honor.

THE COURT: That is all, Sergeant. Thank you.

(Witness excused.)

* * * * * * *

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, OHIO
Case No. 3952
February 20, 1968

STATE OF OHIO

Plaintiff

—vs—

ARTHUR BEN LEWIS, JR.

Defendant

RULING ON MOTION

Whitney, J.

This cause is before the Court on Defendant's Motion filed January 15, 1968 seeking an order "to suppress all

evidence obtained from his 1966 Pontiac". It is the contention of the Defendant that said evidence was obtained in violation of his constitutional rights.

It should be noted that, at the request of counsel, the hearing on and submission of this Motion was delayed in order to permit counsel to complete the taking of depositions in this case, have them transcribed and file memoranda.

At Defendant's request this Motion was assigned for oral hearing; it has been submitted on the testimony adduced at that hearing and memoranda.

No good purpose would be here served by repeating here all the evidentiary matters, oral and written contentions of counsel and all the legal authorities which were cited. As yet the complete record of the hearing has not been transcribed; it will be available to counsel and any reviewing Court. This Court is of the opinion that, to enable counsel adequate time to prepare for trial, it should not delay filing this ruling until that record is available.

Briefly, the record will reveal that the Defendant is a college graduate, was the operator-owner or part owner of two or three different business ventures and was employed as a teacher or instructor in a business college or university.

On October 10, 1967 the Defendant was at the office of the Attorney General of Ohio, Division of Criminal Activities, University Building, in Columbus, Ohio, where he was questioned about the crime charged in the instant case by various employees of that department and Sergeant Lavery, a Deputy Sheriff of Delaware County, Ohio. Following that questioning he was arrested and his car was seized.

It should also be noted that the Defendant had left his car in a public parking lot next door to the office in which he was questioned and arrested; it was seized in that lot.

The Court Reporter's record will reveal State's Exhibit I which was admitted in evidence without objection. This statement and waiver was read and signed by the Defendant prior to any statements being made by him. Defense counsel apparently raises no issue regarding this exhibit. His comments appear on the record. This Court has previously overruled Defendant's Motion to suppress any statements allegedly made by him.

The State contends the car was used in the commission of the felony charged, has evidentiary value which could have been destroyed, was legally impounded and thereafter legally searched.

It is fundamental that not all searches and seizures are illegal; the Constitutional guarantees urged by the Defendant prohibit only unreasonable search and seizure. The test is whether or not the search and seizure were reasonable considering all the facts and circumstances of the case. *Preston v. U.S.*, 376 U.S. 364, 11 L.Ed. (2d) 777. The sixth and seventh syllabi of the *Preston* case is as follows:

> "The right to search and seize incident to a lawful arrest and without a warrant extends to things under the Accused's immediate control and, *to an extent depending on the circumstances of the case, to the place where he is arrested.*
> "The rule allowing contemporaneous searches incident to lawful arrests is justified by the need to seize weapons and other things which might be used to assault an officer or effect an escape *as well as by the need to prevent the destruction of evidence of the crime.*"

The Preston case also recognizes that the reasonableness of searches of motor vehicles and other readily movable chattels which can be hidden or destroyed is not to be tested but the same inquiry which would be made in searches of homes and fixed structures. See Syllabus 4.

As to what is reasonable or unreasonable depends upon the facts and circumstances of each case. There is no fixed formula; unreaonableness cannot be stated in rigid and absolute terms. See *Harris v. U.S.*, 331 U.S. 145, 91 L.Ed. 1399; *U.S. v. Rabinowitz*, 339 U.S. 56, 94 L.Ed. 653.

Defense counsel urges that the State could have obtained a search warrant. Whether or not the warrant could have been obtained is not the test to be applied here. The test is whether or not the search was reasonable.

> "The relevant test is not whether it is reasonable to procure a search warrant, *but whether the search was reasonable*. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." *U.S. v. Rabinowitz, supra*, at page 660. of the Law Edition Report.

Many of the cases referred to by counsel appear in various pamphlets and research aides which this Court has considered. No good purpose would be here served by repeating many of those citations. Counsel are familiar with them and to save unduly extending this opinion the pamphlets and research aides are being referred to.

The 1967 F.B.I. pamphlet "Search of Motor Vehicles" lists many cases regarding the examination of impounded vehicles. These are found at page 21 et seq. The same pamphlet refers to the many cases involving the search of vehicles incident to arrest. These are at page 33.

The Judge writing this opinion is reluctant to refer to such pamphlets in opinions and would prefer to cite and quote many specific cases. Since it is the Court's under-

standing that the pamphlet is available to all counsel it is referred to in the interest of saving time and making this ruling available to counsel as early as possible.

The most recent case revealed by this Court's independent research is *DeMarco v. Greene,* 13 O. Misc. 63 (reported in the January 29, 1968 issue of the Ohio Bar Reporter). In that December 4, 1967 decision the U. S. Circuit Court of Appeals had occasion to consider many of the cases cited by counsel in the instant case. That Court reversed the District Court for *too narrowly restricting the right of search and seizure* incident to a lawful arrest.

The DeMarco case recognizes that the Preston case, *supra,* was still good law and stated the correct rule. DeMarco, page 67. It also recognized that the Rabinowitz case, *supra,* was still the law. *DeMarco,* page 68.

DeMarco also recognized that the very recent case of *Warden v. Hayden,* 387 U.S. 294 (1967) had abolished any distinction between the seizure of mere evidentitary items and contraband, fruits or instrumentalities of crime. DeMarco, pages 68 and 69.

As a matter of fact *Warden vs. Hayden, supra,* permits the seizure of mere evidence in the course of a search incident to a lawful arrest.

The second and fourth syllabi of DeMarco are as follows.

> "The right to search and seize incidental to a lawful arrest, without a search warrant, extends to things under the accused's immediate control and, to an extent depending on the circumstances of the case, to the place where he is arrested.
> "The Fourth Amendment does not require a distinction to be made between items of only evidential value and contraband, fruits or instrumentalities of crime."

Among the authorities relied on by the State is *Cooper*

v. *California*, 386 U.S. 58 (1967). In that case the Defendant was arrested on a narcotics charge, his car legally impounded and the search of it occurred a week after his arrest. The case involved a California Statute regarding the forfeiture of the motor vehicle but many of the statements contained in that opinion bear on the question posed in the instant case.

For example the Court in Cooper, supra, points out that the Defendant was arrested on a narcotics charge and that the car was seized because of and in connection with that same crime. The Court goes on to distinguish the Preston case, supra, in which the Defendant was arrested for vagrancy and that the subsequent search of the car in that case was totally unrelated to the vagrancy charge.

At page 4 of its opinion in Cooper, supra, the Supreme Court observed that the car in that case was seized and impounded because of and in connection with the crime for which Cooper was arrested. In the instant case the car was seized, impounded and searched because of the crime for which the Defendant was arrested.

The extremes revealed in the Preston case, supra, where the car had no connection with the charge of vagrancy and those revealed in the Cooper case, supra, where the State Statute required the officers to seize and impound the car are not cases "on all fours" with the instant case. They reveal guide lines, tests and factors to be considered in the light of the facts and circumstances in the instant case.

It may be noted that, in this Court's opinion, none of the cases cited by counsel are "on all fours" with the instant case. Neither are any of those cited in 27 O.S. Law Journal, page 480, et seq.

As a matter of fact the reported cases reveal different

holdings as to the burden of proof in matters such as those before this Court. 27 O.S. Law Journal, page 520.

No good purpose would be here served by referring to the many Ohio cases dealing with the law of search and seizure. They are revealed in the Law Journal article referred to above. Many of them have been superseded by some of the Federal decisions cited earlier in this opinion.

One fairly recent Ohio case having some bearing on the question is *State v. Waldbillig*, 1 O.S. (2d) 50. This Court recognizes that it is not determinative of the instant case.

A complete record of the testimony and statements of counsel at the various hearings in this case and the memoranda on file will reveal that the State claims not only that the car was used as a means of transportation to and from the scene of the alleged crime but also that it was used to push the Decedent's automobile. Apparently plaster casts and molds of automobile tire tracks and the results of laboratory tests of samples of car paint are expected to be offered as evidence.

Again, the question is "was the seizure and search of the automobile reasonable under all the facts and circumstances of this case?" In this Court's opinion it was.

It appears to this Court that it was reasonable for law enforcement officers to immediately seize a car which their investigation gave them reasonable cause to believe had been used in the commission of the felony charged. The car was in the possession or constructive possession of the Defendant; he had the key and parking ticket for it. It was on a public parking lot adjacent to the building in which public State offices are located and where the Defendant had just been arrested.

This is not a case in which a person's home or private

structure has been unreasonably invaded. This is not a case in which an individual's person has been unreasonably searched.

In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was arrested.

The Court notes that one of the memoranda filed by the Special Assistant to the Prosecuting Attorney indicates that he is not claiming that the seizure and search were incident to the arrest of the Defendant. Under all the facts and circumstances of this case and considering that the seizure and impounding were simultaneous with the arrest, the Court can only indicate that it does not place the same interpretation on the many legal precedents here involved as does that counsel. The arrest and seizure of the car were in the same general transaction.

Every treatise which has come to this Court's attention on the subject here under consideration reveals that the law is in a state of flux. The Cooper case, supra, the Warden case, supra, and the December 1967 DeMarco case, supra, indicate to this Court that the reviewing Courts are not going to continue to so narrowly restrict the right of search and seizure.

While many of the decisions of the State and Federal Courts may not be in full accord, it is hoped that the Supreme Court of the United States will still allow the States some flexibility and permit the adoption of rules, guide lines and precedents which will effectively meet "the practical demands of effective criminal investigation and law enforcement". *Ker v. California,* 374 U.S. 23, 10 L.Ed. (2d) 726. Syllabus 12 and page 738.

It appears to this Court that under our Constitutions

and our law, the law enforcement officers in this case did what they would be expected to do by the public and the Courts. They did not invade anyone's home or private building; they did not subject any individual to any unreasonable search of his person.

Motion overruled. Exceptions reserved.

O. W. WHITNEY, JR.
Judge

cc: R. KENNETH KUNKEL, *Prosecuting Attorney*

DAVID L. KESSLER, *Special Assistant Prosecuting Attorney*

PAUL SCOTT, *Attorney for Defendant*

IN THE COURT OF COMMON PLEAS.
DELAWARE COUNTY, OHIO

Case No. 3952

STATE OF OHIO

Plaintiff,

—vs—

ARTHUR BEN LEWIS, JR.

Defendant,

JOURNAL ENTRY ON MOTION TO SUPPRESS ALL EVIDENCE OBTAINED FROM 1966 PONTIAC

The Defendant's motion filed on January 15, 1968, seeking an order "to suppress all evidence obtained from his 1966 Pontiac", after oral hearing held on January 25, 1968, and after the submission of supplemental memoranda, is hereby overruled. Exceptions reserved to the Defendant.

O. W. WHITNEY, JR.
Judge

APPROVED:
R. KENNETH KUNKEL
Prosecuting Attorney
PAUL SCOTT
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT — EASTERN DIVISION OF OHIO

STATE OF OHIO, COUNTY OF FRANKLIN, ss:

Case No.

ARTHUR BEN LEWIS, JR.
Petitioner,

— vs —

HAROLD J. CARDWELL, WARDEN, ET AL, Ohio Penitentiary
Respondent.

PETITION FOR ISSUANCE OF WRIT OF HABEAS CORPUS

Appearances:

Arthur Ben Lewis, Jr., in propria persona.

I, Arthur Ben Lewis, petitioner in the above styled cause, upon oath deposes and says that: this cause is brought in good faith and hereby petitions this Court for a Writ of Habeas Corpus pursuant to Title 28 U. S. C. A. § 2241 (c) (3). The facts setforth herein are true as he verily believes:

1. Petitioner is presently serving a life sentence for the crime of murder in the first degree, (2901.01 O.R.C.) imposed by the Court of Common Pleas, Delaware County, Ohio, on or about the 29th day of March, 1968, Case No. 3952. The petitioner was represented by retained counsel, Paul Scott, 8 East Broad Street, Columbus, Ohio, and entered a plea

of not guilty to the charge and upon submission of the cause to the jury, the jury returned a guilty verdict of murder in the first degree, with a recommendation of mercy. (Exhibit A). The petitioner was then sentenced to the Ohio Penitentiary for the rest of his life as prescribed by law. A timely motion for a new trial was filed by the petitioner, and subsequently overruled by the trial court.

2. The petitioner has exhausted his state remedies pursuant to Title 28 U. S. C. A. § 2254, in the particular posture of this cause before this court in that the petitioner perfected an appeal to the intermediate appellate court of the State of Ohio, the Fifth District Court of Appeals for Delaware County, Ohio, which court on o rabout the 6th day of February, 1968 without opinion affirmed the conviction, finding no error prejudicial to the rights of the petitioner occurring at the trial of this cause. (Exhibit B). A notice of appeal was then filed in the Supreme Court of Ohio seeking review of the decision of the Fifth District Court of Appeals for Delaware County. A notice of appeal and Memorandum in Support of Jurisdiction was subsequently filed in the Ohio Supreme Court asserting various constitutional issues. The Ohio Supreme Court on or about May 13th 1970, rendered an opinion, reaffirming the decision of the Appellate Court (Exhibit C). Thereafter, the petitioner sought a Writ of Certiorari to the Ohio Supreme Court, pro se, for a review of his conviction and judgment the Supreme Court of the United States denied certiorari on or about the 14th of December, 1970. (Exhibit D).

3. The petitioner respectfully submits, that he presents by this petition ten (10) constitutional issues

of which Nos. 5, 6, 7, 8, 9, and 10, have previously been raised in both the State Appellate and the Ohio Supreme Courts, and he raises four additional constitutional issues Nos. 1, 2, 3, and 4, not heretofore specifically raised in the State Courts, however, such issues are properly before this court in that (a) they are presented by the record and qualify under the Federal Rules of Criminal Procedure, Rule 52(b) as "plain error", and (b) they qualify under the Federal Habeas Corpus Statute, § 2254 b) to-wit: the absence of an available or adequate Ohio Post Conviction Remedy which is based on the doctrine of the Ohio Supreme Court's application of res-judicata.

4. The petitioner further contends that certain Statutes of the Ohio Revised Code are unconstitutional on their face as is more fully demonstrated for the reasons set forth in the following constitutional issues.

CONSTITUTIONAL ISSUES PRESENTED

I

The petitioner's arrest was unlawful in that it was predicated upon a warrant that had issued under Sections 2935.09, 2935.10, 2935.17 and 2935.19 of the Ohio Revised Code, which sections are unconstitutional on their face in that they:

a) fail to provide that a judicial determination be made prior to issuance of a warrant;
b) fail to provide that facts be set forth in the affidavit that would permit an impartial judicial determination as to the existence of probable cause for issuance of the arrest warrant;
c) fail to require the officer to state his source,

or to aver that such source had previously been reliable.

The subsequent eliciting of the petitioner's statements and the seizure of his automobile incident to the arrest when entered as evidence in the trial of this cause served as a basis for his conviction, contravening the petitioner's rights under the forth and Fourteenth Amendments.

II

The petitioner's interrogation and subsequent arrest and seizure of his automotive by a vigilante committee (Division of Criminal Activities — ostensibly at the direction of Deputy Sheriff Lavery) was in violation of petitioner's right of Fourteenth Amendment's procedural due process, where such committee, assigned by the Ohio Attorney General, was, in actual point of law, operating without legal authority where the Attorney General had no such statutory appointive powers and the subsequent seizure of evidence as a result of this action by the Attorney General when entered as evidence during the trial of this matter served as a basis for petitioner's conviction.

III

The petitioner's Fifth Amendment's rights were infringed where the vigilante committee (Division of Criminal Activities) summoned the petitioner to the Office of the Attorney General, initiated an interrogation of the petitioner prior to having given him the warning required by Miranda, and that when the purported warning was given, petitioner was not apprised of certain facts, ie., that anything said can and will be used against him in court,

or that an arrest warrant had been issued for his arrest, or that his conversation, prior to the warning as well as after, was being monitored by a hidden electronic eavesdropping apparatus thereby denying the petitioner his Sixth Amendment right to counsel during a critical stage of the proceedings. and the surreptitiously acquired statement when entered as evidence in the trial of the cause served as a basis of his conviction.

IV

The petitioner was deprived of a fair trial where after the trial court overruled State's Exhibit 111, the trial court erred in permitting the State to present into evidence the hearsay contents of the exhibit in toto, by means of a witness for the State reciting verbatim therefrom; such testimony serving as a basis for conviction and violation of petitioner's rights under the Sixth and Fourteenth Amendments.

V

The warrantless seizure of petitioner's automobile, parked on a private lot one-half block from site of petitioner's arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's Case), further, the automobile was not seized contemporaneous in time and place with petitioner's arrest, and evidence seized therefrom served as a basis of his conviction.

VI

The petitioner was deprived of any chance he may have had for a fair trial where a woman, whom the State alleged, by pretrial press releases, was the petitioner's 'second wife', was issued a subpoena by the State in such flamboyant manner as to maximize newspaper, radio and television coverage and, where, this 'witness' was never called to testify: and where the State with manifest intent, branded the petitioner as a 'beast' in the eyes of the jurors, by parading her through the court room after the jury was seated, and kept her within the eyesight of the jury by the seating arrangement provided by the State of Ohio; hence, the misconduct by the Office of the Prosecuting Attorney in perpetuating the prejudicial publicity which was crucial to, and denied the petitioner's right to a fair trial and served as a basis of his conviction by denying him the right of due process under the Fourteenth Amendment.

VII

Petitioner contends that hearsay evidence of the most flagrant kind was adverted to with the manifest intent of depriving the petitioner of his right to a fair trial where the contents of an unrelated telephone call was admitted under the trial courts mis-interpretation of the hearsay rule and became a basis for conviction and constituted a deprivation of petitioner's right of confrontation and cross examination under the Sixth Amendment.

VIII

Petitioner contends that his right to a fair and impartial trial by a jury free of prejudice was im-

paired where evidence, known to be incompetent when offered, was wrongfully admitted for consideration of the jury and served as a basis of conviction violating the petitioner's constitutional rights as provided by the Fourteenth Amendment.

IX

Petitioner contends that the trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial and served as a basis of the petitioner's conviction, depriving him of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment's right to due process.

X

Petitioner contends that the trial court's denial of petitioner's Motion for a New Trial based upon newly discovered evidence was a flagrant abuse of the discretion lodged in that court and served to perpetuate petitioner's imprisonment for a crime of which he is innocent, denying him due process under the Fourteenth Amendment.

WHEREFORE, as clearly stated in the facts set forth herein, petitioner is being restrained of his liberty by the respondent in violation of the Constitution of the United States, and he therefor prays that the writ be granted and an order entered forthwith in accordance with the existing rules of this Court, promulagated by the Southern District Courts for Ohio, and that this Court take cognizance that petitioner is a layman, unversed in law, and that his petition be construed liberally. Further, this

cause is meritorious and that petitioner is entitled to redress by this Honorable Court.

CARL R. HEADLEE
Notary Public Franklin County, Ohio
My Commission Expires Aug. 1, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 71-76

ARTHUR BEN LEWIS, JR.,
Petitioner,

-vs-

HAROLD J. CARDWELL, Warden,
Respondent.

RETURN OF WRIT

Respondent denies each and every allegation in this cause except such allegations as are hereinafter admitted to be true either in this Return or in the exhibits separately attached hereto.

Respondent says that as Warden of the Ohio Penitentiary he has custody of petitioner, Arthur Ben Lewis, Jr., by virtue of a certain mittimus issued by the Court of Common Pleas of Delaware County pursuant to his conviction of murder, first degree, with recommendation of mercy.

Petitioner was charged with murder in the first degree by indictment filed on November 8, 1967, returned by the Grand Jury of Delaware County. He was tried before a jury in a trial lasting from March 4, 1968, to March 21, 1968, and was found guilty with a recommendation of mercy. On March 29, 1968, he was sentenced to life imprisonment in the Ohio Penitentiary.

Petitioner pursued a direct appeal to the Fifth District Court of Appeals for Delaware County and then to the Supreme Court of Ohio. In the curernt petition, petitioner

alleges ten reasons for issuance of the writ. On direct appeal, however, only the latter six of these issues were raised.

Petitioner's first allegation is that his arrest was unlawful in that it was predicated upon a warrant issued under certain sections of the Ohio Revised Code which sections are unconstitutional on their face. Respondent submits that this claim is not cognizable in this habeas corpus action. Defects in procedure in arrest are not grounds for discharge under habeas corpus. *Fernandez* v. *Klinger*, 346 F. 2d 210 (9th Cir. 1965), *cert. denied*, 86 S. Ct. 191, 382 U.S. 895, 15 L. Ed. 2d 152; *United States ex rel. Williams* v. *Myers*, 196 F. Supp. 280. Testing the validity of an arrest made by state officers is a matter of state law in a federal habeas corpus proceeding. *Manduchi* v. *Tracy*, 350 F. 2d 658 (3rd Cir., 1965), *cert. denied*, 86 S. Ct. 390, 382 U.S. 943, 15 L. Ed. 2d 353. Furthermore, this issue has not been before the Ohio courts yet. Thus, the jurisdictional requirement of 28 U.S.C., §2254(b), concerning exhaustion of state remedies, is not met. Since petitioner was undoubtedly confined on direct appeal to those issues raised by his retained counsel, he, therefore, can make an argument that the delay in appealing this issue is reasonable, and that the right to delayed appeal exists. *Walker v. Maxwell*, 1 O.S. 2d 136.

In any event, respondent contends that petitioner's arrest was legal and founded upon probable cause. See, *Henry* v. *United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134; *McCray* v. *Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62; §2935.04, Ohio Revised Code. Petitioner was arrested after extensive investigation which established the necessary element of probable cause that a felony had been committed and that it was committed by petitioner.

Petitioner's second allegation is that his interrogation and subsequent arrest and seizure of his automobile by the Division of Criminal Activities of the Attorney General's Office was in violation of his right to Fourteenth Amendment due process. Initially, respondent contends that this particular issue has not been raised in Ohio courts on direct appeal or in post conviction processes and that the jurisdictional requirement of 28 U.S.C., §2254(b), regarding exhaustion of state remedies is not met. See, *Walker* v. *Maxwell, supra.* Respondent further denies that the interrogation, arrest and subsequent seizure of evidence was unauthorize. It is also to be noted that petitioner was interrogated on his own consent and that he was arrested by a Delaware County Sheriff's Deputy.

Petitioner's third allegation is that his Fifth Amendment rights were violated in that he was interrogated prior to having been advised of his rights thereunder. This issue has not been raised in Ohio courts and respondent contends that there has been no exhaustion of state remedies as to this issue. 28 U.S.C., §2254(b). See also *Walker v. Maxwell, supra.* In any event, respondent submits there was no violation of petitioner's Fifth Amendment rights. Furthermore, this allegation amounts to no more than a conclusory allegation in that petitioner refers to "the surreptitiously acquired statement" entered as evidence and obtained as a result of his interrogation. What statement petitioner refers to and how such statement was used remains unknown to respondent. Consequently, this allegation is conclusory, and, therefore, not cognizable in federal habeas corpus. *United States ex rel. Russell v. Cavel,* 257 F. Supp. 204 (M.D. Pa., 1966); *Mohler v. Markley,* 197 F. Supp. 72 (S.D. Ind., 1961). In any event, respondent contends that petitioner was given

proper warnings and did sign a written waiver of Fifth Amendment rights. He also, upon request, was able to confer with his lawyer.

Petitioner's fourth allegation is that he was deprived of a fair trial where the contents of a state exhibit, not admitted into evidence, were admitted into evidence by the testimony of a witness who recited said contents verbatim. Respondent submits that this particular issue has not been previously raised in Ohio courts and that it too is not cognizable due to the state remedies therefore not having been exhausted. 28 U.S.C., §2254(b). See also, *Walker* v. *Maxwell, supra.* Furthermore, this allegation is too vague and conclusory to be cognizable in federal habeas corpus. *United States ex rel. Russell v. Cavel, supra; Mohler v. Markley, supra.* In any event, respondent denies that the alleged action denied petitioner a fair trial.

Petitioner's fifth allegation is that the warrantless seizure of his automobile violated his Fourth Amendment rights and that such seizure was not contemporaneous with his arrest, and that evidence seized therefrom served as a basis for his conviction. Respondent denies that petitioner's Fifth Amendment rights were violated in any way. This is so for many reasons. The seizure of the automobile is justified either as a seizure incident to a valid arrest or because there was probable cause to believe the car was an instrumentality of the suspected crime. Petitioner's car was parked approximately a half block away from where he was arrested. Petitioner knowingly relinquished the keys to the automobile and the claim ticket for the parking lot where it was parked. The Columbus Police Department was requested, however, to impound the automobile as *an instrumentality* of the crime and, accordingly, the automobile was so removed.

No property of petitioner was removed from the automobile. The only allegation given to support petitioner's assertion is that such seizure was not contemporaneous in time and place with petitioner's arrest. He also contends that such seizure was for the purpose of ascertaining whether the automobile was an instrumentality of the crime and that the seizure was justified only after the seizure.

Respondent contends that the seizure of the automobile as an instrumentality of the crime was totally justified. There were scrapings on the outside of the automobile which were believed to be from the victim's car as a result of petitioner using his car to push the victim's car, with the victim's body in it, into a river. *Harris v. United States*, 19 L. Ed. 2d 1067, reiterates the principle that:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in position to have that view are subject to seizure and may be introduced in evidence."

See, *Ker v. California*, 374 U.S. 23, 42-43; *United States v. Lee*, 274 U.S. 559; *Hester v. United States*, 265 U.S. 57; *Smith v. United States*, 2 F. 2d 715 (4th Cir., 1924); *United States v. Barone*, 330 F. 2d 543 2nd Cir., 1964) and *Lundberg v. Buckhoe*, 338 F. 2d 62 (6th Cir., 1964).

As to the allegation that the seizure was not contemporaneous in time and place with the arrest, respondent asks whether the arresting officers should have allowed petitioner to leave the interrogation, go to his car, get in the car, and then make the arrest. If so, there could be no doubt then that any search of the car would have been justified. To have required this would have been an unnecessary formality amounting to no more than a prosecutorial ruse. In any event, respondent contends that no items were seized from the interior of the car, that the evidence seized was on the exterior of the car and was

clearly visible and apparent to the arresting officers. Further, petitioner did request the interrogating officers to take custody of the car, and that in so doing, the arresting officers were legally in a position to view the scrapings which gave them probable cause to seize the car as an instrumentality of the crime which petitioner was suspected of committing.

Petitioner's sixth allegation is that he was deprived of a fair trial by the fact that petitioner's alleged second wife was subpoenaed, was never called as a witness, but was kept in the court, thus maximizing newspaper, television, and radio coverage and prejudicing the jury against petitioner. Respondent contends that this allegation does not merit habeas corpus relief and that petitioner was not deprived of a fair trial as a result of these alleged actions. Respondent further contends that this particular witness' testimony was thought necessary by the state, that it later was felt that the state's case was going well enough that this witness would likely not be called. Furthermore, petitioner was afforded ample opportunity on voir dire examination to explore the possible adverse effect of such publicity, but failed to do so. Furthermore, there is no showing that this alone effected the "totality of circumstances" to the extent that there existed lack of due process. *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507.

Petitioner's seventh allegation is that his right to a fair and impartial tral by a jury was impaired where the contents of an unrelated telephone call were admitted under the trial court's misinterpretation of the hearsay rule and became a basis for conviction, depriving petitioner of the right to confrontation and cross-examination under the Sixth Amendment. Although the allegation is unspecific and vague, respondent denies this allegation. There

was admitted into evidence testimony of one Mrs. Jack Smith as to a telephone call she received July 19, 1967. The person on the other end of the line identified himself as the victim of petitioner's crime. Mrs. Smith could not identify the voice but knew it was not the victim. Respondent contends that this matter was not hearsay at all in that it was not offered for the truth or falsity of the matter asserted in the call. The fact that the statement was to be used as evidence of motive. "The requirement in the definition of hearsay is that the statement be offered to prove the truth of the matter asserted," *McCromick on Evidence*, Sec. 224 (1954), at page 661.

Also, in *Cassidy* v. *Ohio Public Service Co.*, 83 O. App. 404, at page 410, the court quotes with approval from 6 *Wigmore on Evidence*, 3rd. Ed., 185, section 1770;

> "Where the utterance of specific words itself is a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein."

The record will disclose that petitioner's counsel did, in fact, cross-examine the witness.

Petitioner's eighth allegation is that his right to a fair and impartial trial was impaired where evidence, known to be incompetent when offered, was wrongfully admitted for consideration of the jury and this same evidence was later a basis for his conviction. Respondent contends that this allegation is so vague and lacking in specificity as to amount to no more than a conclusory allegation. Accordingly, this allegation is not cognizable in federal habeas corpus. *United States ex rel. Russell* v. *Cavel, supra; Mohler* v. *Markley, supra.* This is also the situation with regard to petitioner's ninth allegation which is that the

trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial and served as a basis for his conviction.

Petitioner's tenth allegation is that the trial court's denial of a motion for new trial based on newly discovered evidence was a flagrant abuse of discretion, denying him due process under the Fourteenth Amendment. Respondent submits that this issue is not cognizable in federal habeas corpus. Where a state trial court and a state supreme court, on appeal, found a state prisoner's motion for new trial and in arrest of judgment to be without merit, a state prisoner would not be entitled to federal habeas corpus for review of the merits of the grounds of such motions. *United States ex rel. Harold* v. *Myers*, 367 F. 2d 53 (3rd. Cir., 1966), *cert. denied*, 87 S. Ct. 885, 386 U.S. 920, 17 L. Ed. 2d 791. Accordingly, the question of a due process violation by an abuse of such discretion in the trial court is not cognizable in federal habeas corpus.

For the foregoing reasons, respondent finds no merit in petitioner's allegations and requests that his petition be denied. Unless the court feels that the issues can not be adequately resolved by the pleadings, respondent does not fell an evidentiary hearing is necessary under *Townsend v. Sain*, 372 U.S. 293.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action No. 71-76

ARTHUR BEN LEWIS, JR.,
Petitioner,

vs.

HAROLD J. CARDWELL, WARDEN,
Respondent.

PROCEEDINGS

Before The Honorable Joseph P. Kinneary, Judge, commencing on Thursday, April 20, 1972, at 9:00 o'clock, A.M.

Appearances:

Mr. Bruce A. Campbell,
On behalf of the Petitioner.

Mr. William J. Brown, Attorney General of Ohio, by Mr. Jeffrey McClelland, Assistant Attorney General,
On behalf of the Respondent.

(17-19) — PAUL SCOTT

Called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Would you state your name, please? A. Paul Scott.

Q. Where do you reside, sir? A. 4451 Raven Drive, Westerville, Ohio.

Q. What is your occupation? A. I am an attorney.

Q. Do you know Arthur Ben Lewis, Jr.? A. I do.

Q. How did you come to know him? A. I represented him in a murder case in Delaware County.

Q. Delaware County, Ohio? A. Yes, sir.

Q. How did you become involved in that case initially? A. I received a telephone call late in the afternoon from an attorney by the name of Dave Tingley.

Q. Do you remember the date? A. It was the date of the arrest.

* * * * * * * * *

Q. Would it have been October 10th, 1967, if you know? A. I believe so, yes.

Q. What did you do in response to Mr. Tingley's phone call? A. I met with Dave Tingley. We went over to the Attorney General's Criminal Investigation Section, which was located, I believe at 40 South Third Street, in the same building that the University Club is located.

Q. Is that the Division of Criminal Activities? A. That is correct. I arrived there, it must have been close to four o'clock in the afternoon.

Q. Who was present at the time that you arrived? A. Clyde Mann.

Q. Could you identify him? A. He was an investigator for the Criminal Activities Bureau of the Attorney General, a young chap that was in law school that was also associated with a division of the Attorney General; Deputy Sheriff Bill Lavery from Delaware County; I believe ex-Columbus Police Officer Jim Heise, perhaps, who is now associated with the Attorney General's Office, and several other people that I was not acquainted with.

Q. Do you know if Mr. Heise at that time was associ-

ated with the Attorney General's Office? A. I thought he was.

Q. At the time that you arrived at the Division of Criminal Activities, was Mr. Lewis under arrest, to your knowledge? A. To my knowledge he was not.

Q. Do you know when he actually was arrested. A. Yes.

Q. When was that? A. After five o'clock or five-thirty that particular evening.

Q. Did you see an arrest warrant on that occasion? A. I did.

Q. Do you know who issued that warrant? A. The then Magistrate of the Delaware Municipal Court, Thomas Clark.

MR. CAMPBELL: Your honor, I neglected to tell you that this questioning has been directed to Issue No. 1 as will this final question.

Q. (By Mr. Campbell) First of all, did you handle the Appellate cases for Mr. Lewis? A. I did. That would be the Appellate procedure through the Supreme Court of Ohio.

Q. Did Mr. Lewis at any time during the Appellate process suggest to you as an issue for possible appeal the validity of his arrest? A. Yes.

[26-30]

Q. With respect to Issue No. 5, Your Honor: At the time that you arrived at the Division of Criminal Activities Office, did Mr. Lewis give you the keys to his car? A. Not at the time, no.

Q. When did he, or did he ever? A. Yes.

Q. When did that occur? A. I believe it occurred almost simultaneously, either a little bit before or subsequent to his being placed under arrest by Detective Lavery.

Q. Did he give you any instructions as to what was to be done with the car? A. Yes.

Q. What instructions? A. I was to return the automobile to his family.

Q. Did he tell you where it was? A. Yes.

Q. Where was it? A. On a parking lot approximately a half a block; the parking lot on the opposite side of Paoletti's.

Q. That would be on Third Street? A. Yes.

Q. Did he also give you the parking lot claim check? A. Yes.

Q. What happened thereafter concerning the car keys? A. The car keys were subsequently delivered into the possession of Clyde Mann, along with the ticket.

Q. Did Mr. Lewis authorize you to turn these keys over to anyone besides his wife? A. No.

Q. How did it happen that you did turn them over to Mr. Mann? A. All right. After I arrived at the Attorney General's Office, Mr. Lewis, myself and Dave Tingley went into a conference room and we sat down and discussed, you know, tried to enlighten me as to what happened, what occurred, why he is here and what they are doing.

It was at this time that he had a briefcase in his possession—that's Mr. Lewis—and inside the briefcase there were several items of his whereabouts, his activities, and matters pertaining to his business. Most of these matters pertained to the papers that would apply to a defense of this case.

Upon leaving that conference room I was apprised that they had a warrant in their pocket for Ben Lewis, for the murder of a man by the name of Radcliffe. They requested that Mr. Lewis take a polygraph examination and I said, "Well, you know, you have already blown it. You have got a warrant."

THE COURT: You have already what?

THE WITNESS: You have already blown it. It is a slang word. If you have got a warrant for his arrest —

THE COURT: Who did you say that to?

THE WITNESS: I told Dave Kessler, I said, "If you have got a warrant for arrest, I am certainly not going to give him a polygraph examination; serve your warrant," and they served the warrant on Mr. Lewis.

At that time there was a rush of activity, everybody stood up in the room. Clyde Mann came over to me and he said, "And I want that briefcase."

I said, "You are not going to get that briefcase, that briefcase contains confidential papers that have been turned over to me by my client, and they are my papers and you cannot have them."

He said, "And I am going to take the automobile," he said, "it's down on the parking lot next to Paoletti's."

I said, "Well, Mr. Mann, I am not going to have a physical confrontation with you for that automobile. Here is the key. Here is the ticket, and I will see you in court on a motion to suppress on that."

That's the way he gained possession of the automobile.

Q. In effect he took the keys from you? A. That is correct. Well, in effect. I turned them over to him and told him that the matter will be resolved in a court of law.

Q. Did you make a motion to suppress? A. I certainly did.

Q. What was the outcome of that motion? A. Overruled.

Q. At trial was evidence presented relating to the Defendant's automobile? A. Yes, sir.

Q. What was the significance of that evidence? A. Damaging.

Q. Could you characterize it more fully?

MR. McCLELLAND: Your honor, I will object to this particular question.

THE COURT: Overruled.

A. Well, they not only took specimens of the tire tracks, treads themselves, but they took paint chips to determine the layers of paint, quality of paint, the type of paint, including all the undercoating layers right down to the bare metal.

These were analyzed by BCI and were used to establish that on the Radcliffe automobile there were flakes of paint on the rear bumper. Apparently the automobile had been pushed over an embankment by another automobile. The flaked paint that they allegedly found on the rear bumper of the Radcliffe car was of the same—strike that—was similar in texture, similar in color, and similar in layers as they found from the automobile that they seized.

The tire treads were also used to establish the similarity of the tire treads found at the scene from the first that were on Mr. Lewis's car.

Q. (By Mr. Campbell) Mr. Scott, to your knowledge was any search warrant ever issued for that car? A. Never was.

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[71]

Q. I believe on direct that we got a little mixed up about issues that were presented at the Appellate level. Did you ever question the validity of the arrest itself, the arrest warrant, the probable cause for the arrest? Did you ever question that itself at the trial level? A. No, sir.

Q. Was this a decision made in your own professional judgment? A. Yes, sir.

Q. I assume it was. A. Yes, sir.

Q. Mr. Scott, as of the latter part of 1967, the early part of 1968, how long had you been practicing law? A. I was admitted to the bar in March 1957.

Q. If you can say, what percentage of your practice is involved with criminal matters? A. about 50 percent.

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[45-48]

Q. Where was his car parked? Was his car parked on the parking lot between Paoletti's and the bank over there on Third Street, or was it the one on the corner? A. I cannot tell you that. I thought those lots were somewhat connected in the rear.

Q. I believe there is a bank between them. You can't remember where it was? A. It was approximately a half a block away from where the arrest took place.

Q. But it was a public parking lot? A. It's open to the public, if you pay.

Q. Mr. Lewis gave you the keys to his car and the claim ticket; is that correct? A. That is correct.

Q. Did he say anything to you when he gave you the keys and the ticket? A. Other than to take them home to his family.

Q. Was this a general request or was it specifically made to you? A. No, he was talking to me. There wasn't any general request. He was talking directly to me.

Q. Was he planning on you following him down to the Delaware County Sheriff's Office? A. No, I don't think.

Q. Would you have followed him down there? A. Doubtful.

Q. There was testimony regarding a briefcase with certain of his papers contained therein. I believe you

stated that Mr. Mann approached you and said, "Give me the brifecase," or "I want the briefcase," something to that effect? A. Right.

Q. Is that correct? A. That's correct.

Q. What did he say pertaining to the car keys? A. He said, "I am going to take the car too," and I said, "Under what authority?"

Q. What did he say? A. He said under the authority that it was used in the commission of a felony.

Q. Did he tell you that? A. Yes.

Q. What did you say after that? A. If my words are correct, I said, "Well, Clyde, I am not going to have a physical confrontation with you about the automobile. I will see you in court on a motion to suppress. Here is the key and the ticket."

Q. Did you give him the briefcase too? A. Oh, no.

Q. You did not? A. The reason was obvious. The briefcase was in my possession. The automobile, I wasn't certainly going to enter into a track meet and run down to the end of the corner and get the automobile and try to run from him, so I had no control over the car as such.

Q. But you did have the keys? A. Yes.

Q. There probably weren't keys in the car at the time then? A. No.

Q. So he could run down all day to the car without the keys. You can't do much with it. That's correct. A. No, they just called a wrecker and had it hauled away.

Q. Did he threaten you in any way? A. Clyde is not—no, there was no threat.

Q. Did you really foresee a possible physical confrontation? A. Well, let me say this, sir: I did not willfully turn the automobile over to Clyde Mann. It was done under protest, and I told him that I thought the best place to argue about it would be in a court of law.

Q. So, you turned it over subject to what would hap-

pen in a court of law? A. That is correct.

Q. To your knowledge was the car itself ever entered? A. Entered, what do you mean?

Q. The doors opened and the car entered? A. I don't know what happened to it.

Q. But in any event was there any evidence from the interior of the car admitted at trial? A. My recollection would be no.

Q. Your recollection, to the best of your recollection, the only evidence that was taken from the car was paint chips from the exterior surface and tire casts; is that correct? A. Well, paint chips from the interior surface too that was not visible.

Q. What do you mean? A. You couldn't see what was under the color of the paint. It was not in plain view. Certainly the layers of paint and their structure and their color of the primer was not in plain view.

Q. But it wasn't taken from the interior of the car though; the interior as laymen understand the interior? A. They didn't get it on the inside of the car. They got it on the outside of the car.

[72-73]

WILLIAM B. LAVERY

Called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Would you state your full name, please? A. William B. Lavery.

Q. Where do you live, sir? A. I live at 39 Spring Street, Delaware, Ohio.

Q. What is your occupation? A. I am currently the

Chief Deputy at the Sheriff's Department in Delaware County, Ohio.

Q. In 1967 how were you employed, sir? A. At that time I was a Sergeant in the Sheriff's Department in Delaware County.

Q. Were you the chief investigating officer in the Radcliffe murder case as far as the Delaware County Sheriff's Department was concerned? A. Yes, sir, I was.

Q. Mr. Lavery, were you present on October 10th, 1967 in the Office of the Division of Criminal Activities of the Attorney General of Ohio in Columbus, Ohio? A. Yes, I was.

Q. Was this an occasion at which Mr. Lewis was interrogated? A. Yes, that's correct.

Q. Was a recording made of the interrogation that day, to your knowledge? A. Yes, I believe it was recorded.

Q. How was it recorded? A. On a tape recorder.

Q. By whom? A. Mr. Mann.

Q. Was Mr. Lewis informed that it was being recorded? A. Not by me, sir. I don't know if he was by anyone else or not.

Q. If you know, who reduced this recording to writing? A. Well, I don't know for sure. I have an idea.

Q. Who was it? A. It would be my assumption that the secretaries there at the Division of Criminal Activities did it.

Q. Thank you. During the October 10th interrogation I would like to ask you if Mr. Lewis did a series of things.

First of all, did he make a call to the Columbus Technical Institute at approximately 12:15?

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[75-80]

MR. CAMPBELL: Your Honor, these questions I have

neglected to tell you related to Issue No. 4.

The following questions relate to Issue No. 5:

Q. (By Mr. Campbell) Prior to October the 10th had Arthur Ben Lewis been interviewed by yourself? A. Yes.

Q. Where? A. At his business known as Graham Auto Specialties, I think it was, on West Broad Street, or on the west side of Columbus some place.

Q. At that time did you ask him for a description of his car or cars? A. Yes.

Q. Did he give you such a description? A. Yes.

Q. Did he not in fact point one of them out in the parking lot? A. Yes, I believe he did.

Q. Was this the same car that was later seized? A. Yes.

Q. What kind of car was that, if you remember? A. I believe it was a gold 1966 Pontiac.

Q. Can you tell us when this occasion was that you went to Graham's Auto Specialties? A. The homicide occurred on Wednesday, July 19th. This would have been the following month. I think the 24th, I believe.

Q. Would it be fair to say then that in July— A. Definitely.

Q. —of that year you knew the description of Mr. Lewis's car? A. Yes, that is correct.

Q. Did you obtain an arrest warrant for Mr. Lewis on October the 10th? A. Yes, I did.

Q. Did you also obtain a search warrant? A. No, I didn't.

Q. Why not? A. I saw no reason for a search warrant.

Q. Did you ever obtain the search warrant? A. We did obtain one later for I believe his property, and perhaps that of his father on Dublin Road.

Q. But pertaining to the car? A. No, sir.

Q. What action was taken regarding Arthur Ben Lewis's car on October the 10th? A. After I had placed

him under arrest, and his attorney was present, I can't recall exactly what sequence but I informed him that I was going to seize the car because I had probable cause to believe it had been used in the commission of a felony, and also Mr. Lewis as I recall pulled a parking ticket from his pocket.

I am referring to a ticket that you would get at a commercial parking lot. He asked if we would take care of his car inasmuch as he was under arrest and was going to be transported to Delaware.

Q. Your testimony is that Mr. Lewis asked you to take his car? A. Yes. He asked us to take care of the car and handed a parking ticket.

Q. Where was the car? A. I believe it was in a commercial parking lot which would be the first one south of 40 South Third Street.

Q. Approximately how far from where you were and where Mr. Lewis was is this lot? A. I should say a quarter of a block.

Q. How long had Mr. Lewis been at the Division of Criminal Activities by the time that he was placed under arrest? A. I believe he arrived at 10:00 A.M. We interviewed him until approximately noon and then another investigator, Mr. Heise and I, took Lewis to his home and with his consent we searched for a shotgun. Then we returned to the Division of Criminal Activities at 40 South Third Street. I believe we had lunch.

I think we got back there at about—I am guessing on this—I think about 2:30 or 2:45, and then when I placed him under arrest and we left, I believe about 5:30 P.M.

Q. When did you obtain the arrest warrant for Mr. Lewis? A. On the morning of October 10th, 1967.

Q. Approximately what time? A. I would say about 8:00 A.M., in that area.

Q. Did you have this warrant in your possession during the entire day? A. Yes, I did.

Q. Did you tell Mr. Lewis that he was to be arrested at any time prior to his actual arrest? A. No, I didn't tell him. As I say, I think we left about 5:30 and I would say I probably informed him considerably before that, because I think when he found out he was going to be arrested, that he called his attorney, but he hadn't been informed like in the morning or anything like that.

Q. At the time he was allegedly informed of his rights, he at that time did not know that he was to be arrested? A. Well, I don't know if he knew it or not. I didn't tell him.

Q. You had not told him? A. I didn't tell him, no.

Q. You had not told him at that point that you had a warrant for his arrest? A. That is correct, I had not.

Q. Who seized the car? A. Do you mean who actually physically seized it?

Q. Yes. A. The Columbus Police wrecker. The Columbus Police Department wrecker.

Q. Who requested that that be done? A. I requested it. As I said, since I had to transport the prisoner back to Delaware, of course I couldn't do it, so I asked Mr. Mann if he would take care of it. I frankly don't know who actually called the Columbus Police Department but it would have been one of the investigators at the Division of Criminal Activities. I suppose it would be Mr. Mann.

Q. Did you later cause paint samples to be taken from the car for analysis? A. I requested that. I didn't do it myself, nor was I present when it was done.

Q. Do you know who did it? A. I believe the agent from the BCI at London, Ohio did it.

Q. That would be the Bureau of— A. Criminal In-

vestigation and Identification. As I say, I wasn't present when that was done.

Q. But it was done at your request? A. Yes.

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Cross-Examination

[84-86]

By Mr. McClelland:

Q. Mr. Lavery, I assume that you entered this case on July 19th, 1967? A. Yes, sir.

Q. When the body was discovered in Delaware County? A. That is correct, yes.

Q. Calling your attention to October 10th, 1967, who all was present in the room when Mr. Lewis was advised of his constitutional rights? A. Again, I can't recall precisely. I know Mr. Mann, myself, and of course Mr. Lewis and I believe Mr. Heise was there. I am sure about Mr. Mann and myself and Mr. Lewis. I am a little vague on who else was there.

Q. Did you see him sign a waiver of those rights? A. Yes, I did.

Q. I believe you testified that prior to October 10, 1967, you went to Graham's Auto Sales? A. Graham's Auto Specialties, I believe it was called.

Q. Graham's Specialties, and you talked to Mr. Lewis; is that correct? A. Yes, sir.

Q. This was the Monday after the Wednesday when the body was found? A. That is correct.

Q. Was Mr. Lewis a suspect at this time, or was he— A. He became a suspect at that time.

Q. At that time? A. Yes.

Q. Once again referring to October 10th, 1967, can you recall the time or at what time Mr. Lewis requested that his car be taken care of? A. I can't recall precisely,

of course, but I would say in the area of 5:00 P.M. or somewhere in that general area.

Q. Did he make this request before or after the arrival of Mr. Paul Scott? A. Mr. Scott was present when the request was made. In fact, he was standing right there beside me.

Q. Did he ever make any request before Mr. Scott arrived relative to the car? A. None that I recall, no.

Q. How did he make the request? Did he make it as a general request, of you specifically, Mr. Mann specifically? A. Not, it was just a general request. I recall he pulled the ticket out of his pocket. I think—well, I don't recall which pocket, but he pulled this ticket out and held it out and said, "Will you take care of my car?"

I don't think frankly that he was talking to anybody in particular or not precisely to me or to Mr. Mann, just all of who were standing there.

Q. What happened then after he brought the ticket out of his pocket? A. I told him to give it to Mr. Mann and that his car was going to be impounded at the Columbus Police Department impounding lot.

Q. Did you mention at that time you believe the car to be an instrumentality in the commission of a crime? A. Oh, yes, yes.

Q. Was there any kind of reaction from Mr. Scott? A. No, I don't recall any reaction.

Q. Do you recall him having any words with Mr. Mann? A. I don't recall any.

Q. Do you recall— A. I think at that time there was some question about a briefcase that Mr. Lewis had. I think Mr. Mann asked if we could look in it and Mr. Scott said no, and this was at the same time that this car thing was going on, but I don't recall any exchange of words about the car being seized.

Q. Then the car was in fact taken from the parking

lot by the Columbus Police Department wrecker; I believe that is what you said? A. Yes.

Q. Was there any evidence taken from the inside of the car? A. No, sir.

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[88-93]

THE COURT: Mr. Lavery, you have testified here this morning that Mr. Lewis had the parking lot ticket to his automobile in his pocket on October the 10th of 1967 at the Attorney General's Office on South Third Street, and during the court of your questioning; is that correct?

THE WITNESS: Yes, Your Honor, that's correct.

THE COURT: You also testified that Mr. Lewis took the parking lot ticket out of his pocket and asked if either you or Mr. Mann — you weren't sure which — could take care of this automobile since you were going to take him back?

THE WITNESS: Yes, sir, that is correct.

THE COURT: Did Mr. Lewis have the keys to his automobile also?

THE WITNES: Your Honor, I don't recall precisely, but I think he did not have the keys. I may be in error on that, but I think he did not have them.

THE COURT: Mr. Lavery, there is testimony in the record of this hearing here this morning, specifically by Mr. Scott and Mr. Scott testified that he entered physically the conference at the Attorney General's Office on October the 10th around 4:00 o'clock in the afternoon. Would that be approximately correct?

THE WITNESS: I should think that would be about correct, Your Honor, yes.

THE COURT: Sometime between 4:00 o'clock and

the time that the conference terminated, you took Arthur Ben Lewis back to Delaware; that Clyde Mann demanded Mr. Scott that he, Mr. Scott, turn over the keys to Mr. Lewis's car and the ticket to Mr. Lewis's car. Do you recall that Mr. Mann demanded that Mr. Scott turn over the ticket and the keys to Mr. Lewis's car?

THE WITNESS: No, sir, that isn't correct at all because I recall precisely Mr. Lewis removing the parking ticket and asking if some one of us would take care of his car. I don't recall the keys.

THE COURT: You do not recall Mr. Scott turning the keys and the parking ticket over to Lieutenant Mann and saying to Lieutenant Mann, "You take it and I will see you in court on a motion to suppress"?

THE WITNESS: Your Honor, I don't recall that. I recall this incident that I have testified to with the parking ticket. It occurred in the hallway there at the Division of Criminal Activities. I could even point out the exact spot.

Perhaps something like this occurred in some other room that I wasn't aware of, but I certainly don't recall.

THE COURT: It occurred in the hallway. Was this when you were on your way out?

THE WITNESS: Yes, sir, we were about to leave.

THE COURT: All right. Thank you. You will hold yourself available for further testimony.

MR. CAMPBELL: Your Honor, before the witness is excused, can I confer with my client for a moment?

THE COURT: Yes.

(Thereupon followed a conference at Petitioner's counsel table.)

MR. CAMPBELL: That is all, Your Honor.

THE COURT: One more question: Mr. Lavery, at any time between 10:00 o'clock on the date of October 10th,

1967 and until you were in the hallway and, as you testified, Arthur Ben Lewis gave you the ticket or surrendered the ticket to his car, do you know how Arthur Ben Lewis arrived or how he came to the office of the Attorney General?

THE WITNESS: I believe we did, Your Honor. Again, I would have to check.

THE COURT: Did you know his car was parked on the lot south of the office?

THE WITNESS: No, I didn't know that and I don't believe Mr. Mann did. I didn't know it personally.

THE COURT: You say you didn't?

THE WITNESS: I did not.

THE COURT: Was it your intention to confiscate his automobile?

THE WITNESS: Yes, sir. That was my intention even if he had not asked us to take care of it. It was my intention to confiscate it in any event. I just wasn't sure where it was parked.

THE COURT: For what reason?

THE WITNESS: I felt that I had cause to believe that it had been an instrumentality in this crime.

THE COURT: You would have—it was your intention to take possession of this car as an instrumentality in the perpetration of the crime, whether the car was in the parking lot on South Third Street or any other place; is that correct?

THE WITNESS: Yes, sir.

THE COURT: All right. You are excused now.

Please call your next witness, Mr. Campbell.

MR. CAMPBELL: Your Honor, at this time my only remaining witness is the Petitioner.

THE COURT: All right.

[93-97] **ARTHUR BEN LEWIS**

Called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Would you state your full name, please? A. Arthur Ben Lewis, Jr.

Q. You are the Petitioner in this action? A. Yes, sir.

* * * * * * * * *

Q. (By Mr. Campbell) Mr. Lewis, on October 10th, 1967 did you have occasion to go to the Division of Criminal Activities Office of the Attorney General of Ohio? A. Yes, sir. The previous day I received a telephone call from Clyde Mann and he requested that I come down the following day for additional questioning.

Q. Were you told any other purpose of that meeting? A. No, sir.

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Q. Were you ever told that you were to be arrested? A. No, sir.

Q. When did you actually learn that you were to be arrested? A. Shortly after between 3:30 that afternoon and 10 minutes of 4:00 when my attorney arrived at the Division of Criminal Activities.

Q. At any time during the proceedings of October the 10th were you advised of your Constitutional rights to counsel, not to testify against yourself, or any other rights? A. Prior to questioning, no, sir. I was ushered into the lobby there at the Division of Criminal Activities approximately between 10:00 and 10:15. I was told

to be seated; that they would get to me directly, and approximately between 10:25 and 10:30 A.M. I was ushered into Mr. Mann's office. Without any rights or no conversation really except good morning, I was questioned in four general areas before actually they did pull a written form, rights form, out for me to be signed.

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Q. Were you aware that there was an arrest warrant? A. No, sir, I wasn't aware of that until, as far as an arrest warrant is concerned, until it was served on me at approximately 5:30 that evening.

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[101-104]

Q. (By Mr. Campbell) Mr. Lewis, did you drive to the Division of Criminal Activities? A. I did, sir.

Q. Where did you park your car? A. In the parking lot, privately-owned parking lot adjacent to Paoletti's Restaurant, which was a quarter to a half a block away from where the Attorney General's Office was.

Q. While you were being held in the Attorney General's Office, did you have any means for getting at that car? A. I was in Mr. Mann's office the majority of the time, which didn't have any windows, and it was completely in the back end of the office there. There would be no way to have gotten at it any way.

Q. Were you ever shown a search warrant for that automobile? A. No, never.

Q. Did you ever consent to a search or seizure of that automobile? A. No, sir.

Q. Did you ever ask that it be removed by either the Attorney General people or the detectives involved? A. No, sir. I gave my keys to Paul Scott and the claim check to Paul Scott before I was arrested, sometime

between the time he arrived and I was arrested. As I remember it was probably a half hour or so before I was actually arrested, and I asked him to make sure the car was taken home so my family could use it.

Q. Did you ever change those instructions? A. Not once, no, sir.

Q. How long were you held in the office prior to the time that you were actually arrested? A. I arrived there approximately between 10:00 and 10:15, and I didn't leave until 5:30 approximately or 4:30 that afternoon when I was taken to Delaware County Jail.

Q. Prior to October the 10th, 1967 did the police officers involved have a description of your car? A. Yes, sir. When the detective Sergeant Lavery and Sam Powers of Franklin County, their initial investigation approximately a week after the incident, the Radcliffe murder, in their initial investigation they asked me what kind of car I had. I told them. In fact I said there it is, sitting out there on the lot. They asked me the color of it, and I told them it was beige with a dark top.

Q. Were they in a position to observe for instance your license plate number? A. Yes.

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Cross Examination

By Mr. McClelland:

Q. Mr. Lewis you were invited to go down to the Attorney General's Office; is that correct, on October 9th you were invited? A. I would say it more was put to me as a form of a request to come down for additional questioning.

Q. It was not a demand? A. It was not a demand, but

it was a request more than an invite; some place in between there I would say.

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[108-110]

Q. At what point did you decide you better get a lawyer? A. Is when I requested one at approximately 12:10.

Q. 12:10? A. Yes. That was when I first requested one, and this is the part that's deleted out of the transcript.

Q. This is deleted out of the transcript? A. Yes.

Q. What was the reaction to—I assume you requested — A. It was all in the same sentence, as I stated before. I was concerned that I was going to have approximately 50 young adults at Columbus Technical Institute that weren't going to have a teacher at 12:35 when I was due to a class over there, and so that was a concern. I requested Mr. Mann that I thought that I probably ought to get an attorney, and I needed to use the toilet facilities; I would like to grab a bite to eat because I hadn't eaten since the night before, and I would like to make some arrangements or teach my class or make some arrangements to teach those classes that afternoon, and that I would come back approximately at 2:00 o'clock or 2:15 with my attorney for additional questions or any other activities they had in mind.

Q. What was his response? A. He said no. Then after some argument he did relent to let me make a call to Mr. Hammond of Columbus Technical Institute to arrange for somebody to teach my class. Then I immediately said, after I hung up, "Well, how about letting me call my attorney at this point?"

He said, "You have already made your one telephone call," and kept going.

Q. What time did you call Dave Tingley then? A. Approximately 3:30.

Q. What apparently changed Mr. Mann's mind or Mr. Lavery's or Mr. Kessler's, those present in the room? A. You would have to ask them, sir. I don't know.

THE COURT: Just let me as you: Did you ask them again for permission to call an attorney?

THE WITNESS: At 3:30, sir?

THE COURT: Yes.

THE WITNESS: Yes, sir.

THE COURT: What did they say?

THE WITNESS: Yes.

Q. (By Mr. McClelland) Did you hear Mr. Lavery testify that in the course of that day you returned with him to your home? A. I am sorry?

Q. Did you hear Mr. Lavery testify this morning that in the course of that day you, along with Mr. Lavery, returned to your home to search for a shotgun? A. Yes, I think he has the time all balled up on that, but it was approximately at 1:00 o'clock instead of 12:00 as he testified to, and we did go to my home voluntarily. I consented. I didn't know where the shotgun was that I had, and I consented to go, and we were there approximately an hour, hour and a half and came back then, and some questionings were resumed; shortly after that then I asked for the attorney and they permitted me.

THE COURT: Up until the time you asked for the attorney around 3:30, were you aware that Sheriff Lavery had a warrant for your arrest?

THE WITNESS: No, sir. That was never told to me until actually between 3:30 and the time my attorney arrived; that they said—I asked them "Are you finally going to get around to putting me under arrest?"

They said, "Yes," but even then I didn't know there

was an arrest warrant issued; not actually 5:20, 5:30 when they served it on me, sir.

Q. Did you ever ask anyone if you were under arrest? A. I think it was after 3:30 actually.

Q. At least the purpose of the question, did you ask what the purpose of all this questioning was? Mr. Lewis, you are a smart man. I find it hard to believe that you would have subjected yourself to this without at least inquiring as to what was going on.

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[113-114]

Q. You did specifically request Paul Scott to take your keys and the claim check; is that right? A. Yes, sir, gave it to him.

Q. It was not a general request? A. No, sir, no way.

Q. You gave them specifically to him? A. Yes.

Q. What did you say to him when you gave them to him? A. I would like for you to see that my automobile, which is parked in the parking lot on the other side of Paoletti's Restaurant, would be removed to my home so my family might have use of it.

Q. Another question about the parking lot itself: That parking lot is pretty crowded, isn't it? A. Yes, sir.

Q. Fairly narrow space for a lot of cars? A. Yes.

Q. In the course of the whole time you were at the Attorney General's Office could you come and go as you pleased? A. No, sir.

Q. Did you ever try? A. Yes, sir, at 12:15 when I requested—12:10, 12:15 area, when I requested to go to contact an attorney and take care of my classes and this sort of thing, I asked to leave. I got up as if I were to leave and I was stopped from leaving.

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DAVID KESSLER

[117]

Direct Examination

By Mr. McClelland:

Q. State your full name, please? A. David L. Kessler.

Q. What is your occupation? A. Attorney-at-Law.

Q. What is your address? A. Office address, 50 West Broad Street.

Q. Were you an attorney-at-law in the latter part of 1967 and the early part of 1968? A. Yes.

Q. How were you employed at that time? A. I was employed as an Assistant Attorney General under William Saxbe, State Attorney General.

Q. Specifically what were your duties with the Attorney General at that time? A. At that time I was the Chief of what was called the Division of Criminal Activities.

Q. Did you have an occasion to act as an Assistant Prosecuting Attorney in the case of The State of Ohio versus Arthur Ben Lewis, Jr.? A. Yes.

* * * * * * * * *

[122-129]

Q. (Br. Mr. McClelland) Mr. Kessler, were you present in the office when Mr. Lewis relinquished his keys to his car and the claim check to get the car out of the parking lot? A. I can only answer it this way: I was around the office. As far as me being present when there was a conversation, if there was, I don't remember it. I have been trying to think about that, and I have to say that I wasn't physically there when this took place.

Q. So, you don't specifically remember? A. No I

don't specifically remember it. If I was there, I don't remember that.

Q. Did you represent the State as an Assistant Prosecuting Attorney during a motion to suppress evidence obtained from that car? A. Yes, sir.

Q. Do you recall whether or not Mr. Lewis ever took the stand to deny that he gave his consent to Mr. Mann's taking the keys and the claim check? A. I don't recall Mr. Lewis ever taking the stand. If he did, I don't remember it.

CLYDE MANN

(122-129)

Called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McClelland:

Q. State your full name, please? A. Clyde H. Mann.

Q. Your address? A. Dublin, Route 1, Summitview Road.

Q. Are you employed, sir? A. Yes.

Q. What is your occupation? A. Security Officer with The Ohio National Bank.

Q. How were you employed in the middle until late 1967 on into 1968? A. Attorney General's Office.

Q. What was your specific duty with the Attorney General's Office? A. In the Division of Criminal Activities.

Q. Your were Chief Investigator; is that correct? A. Yes.

Q. Did you and did the office have an occasion to become involved in an investigation and prosecution of the Petitioner in this case, Arthur Ben Lewis? A. Yes.

Q. What were the circumstances of the involvement,

of the office's specific involvement? A. The Delaware Sheriff's Office asked us to assist them in the investigation of the murder of Mr. Radcliffe.

Q. You did so assist them? A. Yes.

Q. Mr. Mann, were you present in the Attorney General's Office physically on October 10th, 1967? A. Yes, sir.

Q. During an investigation of Mr. Lewis by yourself? A. Yes.

Q. Who else was present during the investigation? A. Mr. Lavery and Mr. Heise. I don't recall who else might have been there.

Q. Mr. Mann, handing you what has been marked as Respondent's Exhibit B, is your signature affixed thereon as a witness? A. Yes.

Q. Do you notice the time up in the right-hand corner of the page? A. Yes, sir.

Q. What is that time? A. 10:40 A.M.

Q. Was the statement actually signed at 10:40 A.M.? A. Yes, it was.

Q. Mr. Mann, do you recall at the trial of Mr. Lewis reading into the transcript the transcription of this investigation which I have referred to? A. Yes.

Q. Was the transcription accurate? A. Yes.

Q. That is chronologically? A. Yes.

Q. It was an accurate transcription of the recording? A. Yes.

Q. Was the recording an accurate recording of the investigation itself? A. Yes.

Q. Calling your attention to later in the day of October 10th, 1967, specifically do you recall Mr. Lewis ever requesting you to take care of his car and his claim check? A. Yes.

Q. Was this before or after Mr. Scott had arrived? A. This was after Mr. Scott arrived.

Q. Also let me ask you: At any time prior to approximately 3:30 did Mr. Lewis ever request an attorney? A. No, not that I recall.

Q. Therefore you did not refuse a request to see an attorney? A. No.

Q. But at 3:30 he did request an attorney, approximately 3:30? A. Yes.

Q. The attorney was Dave Tingley, I believe? A. Yes.

Q. Getting back to later on in the afternoon, could you relate the circumstances of your taking the car keys and the claim check? A. At the time the warrant was served by Mr. Lavery—

THE COURT: Mr. Mann, let us put this in the reference of time and place within the building. Where did it take place and at what time within the building?

THE WITNESS: To the best of my knowledge approximately 5:00 P.M. It was in our office in the hallway of our building, which is on the ground floor.

THE COURT: Is this the hallway—there is a hallway that you enter from Third Street; isn't there?

THE WITNESS: Yes. Let me clarify that. This is a hallway inside our office, inside.

THE COURT: But it did not take place in the room in which the investigation was conducted?

THE WITNESS: No.

THE COURT: This was about 5:00 P.M.?

THE WITNESS: To the best of my knowledge.

THE COURT Go ahead.

Q. (By Mr. McClelland) Once again would you relate specifically what occurred when he relinquished the possession? A. As I recall Mr. Lewis stated, "Would you take care of my car?"

At that time he handed me the claim check to the parking lot. I don't know if the keys was handed to me or anything about the keys.

As I recall they could have been in the car or he could have handed them to us. I don't know.

Q. The claim check was handed directly to you by Mr. Lewis? A. To the best of my knowledge, it was.

Q. Did you recall any particular confrontation you might have had with Mr. Paul Scott at that time? A. Concerning.?

Q. Let me ask you this then: Was there a briefcase? Did Mr. Lewis have a briefcase with him? A. Yes.

Q. Do you recall any confrontation with Mr. Paul Scott regarding the briefcase or the claim check or car keys? A. I recall that we asked to take possession or look into Mr. Lewis's briefcase.

THE COURT: You asked Scott?

THE WITNESS: Yes.

THE COURT: Did Mr. Scott have physical possession of this briefcase at the time you asked that?

THE WITNESS: I think Mr. Lewis had physical possession, and I was going to say, I don't know if I asked Mr. Lewis or Mr. Scott. They was both there together, and I asked if I could have this briefcase, and that was the only words that we had.

Q. (By Mr. McClelland) Did he respond to you at all? A. Yes. He said absolutely not; that I could not have the briefcase.

Q. But you already had the claim check in your possession? A. Well, this was all within a few seconds of each other, so I couldn't say I had the claim check first.

THE COURT: Did you ask for the keys and the claim check, or were they volunteered to you?

THE WITNESS: Mr. Lewis asked me to take care of the car. He handed over the claim check. As I say, I don't recall the keys.

THE COURT: All right. Go ahead.

THE WITNESS: Then I asked about the briefcase.

THE COURT: What then happened to the car?

THE WITNESS: It was picked up by the Columbus Police Department wrecker.

Q. (By Mr. McClelland) And impounded? A. And impounded.

Q. Did you believe the car to be—I will ask it this way: What was your purpose in wanting the car? A. I believed that this car was used in a felony. That is the reason we wanted it.

Also, we wanted the plaster casts of the car that was on the car.

Q. But he did make the request of you to take care of the car? A. Yes.

MR. McCLELLAND: Thank you, Mr. Mann.

THE COURT: Before you cross-examine, Mr. Mann: You were present during the entire day, were you not, on October the 10th, 1967 when Arthur Lewis was questions; is that correct?

THE WITNESS: Yes.

THE COURT: Were you aware that there had been a warrant issued for his arrest early that morning in Delaware, Ohio?

THE WITNESS: Yes.

THE COURT: You have just stated, I believe, that if Mr. Lewis had not asked you to take care of his car and handed you the claim check and maybe—maybe not—the keys, that you would have taken possession of it anyway; is that correct?

THE WITNESS: Well, I think we would have had a consultation with our attorney, which was Mr. Kessler, to decide that point, but this did not.

THE COURT: Didn't you know throughout the whole day that you wanted this car and that you regarded

this automobile as an instrumentality of the crime, and you just said that you wanted to take the impression of tires. You knew that throughout the day; didn't you?

THE WITNESS: Yes, sir.

THE COURT: You did not talk to Mr. Kessler about it during the day; did you?

THE WITNESS: Your Honor, I don't recall that particular part.

THE COURT: So, if Arthur Ben Lewis had not, as you have testified here, surrendered possession of the car to you by giving you the claim check and asking you to take care of it, you would have taken possession of the car nevertheless; wouldn't you?

THE WITNESS: We probably would have, yes, sir.

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[134]

WILLIAM LAVERY

Having been previously duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. McClelland:

Q. I believe you have already been sworn. Will you state your name for the record?

THE COURT: The record will show that the witness William Lavery is now called as a Respondent's witness on direct examination.

MR. McCLELLAND: Thank you, Your Honor.

Q. (By Mr. McClelland): Mr. Lavery, regarding the seeking of an arrest warrant on the morning of October 10th, 1967; do you recall that? A. Yes, I do.

Q. Who was the Magistrate before whom you sought it? A. Judge Thomas C. Clark.

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[138-143]

THE COURT: Why don't you withdraw your question and why don't you ask him what information he had based upon his own investigation at the time that he made the application to the Magistrate for the issuance of the warrant?

MR. McCLELLAND: All right.

THE COURT: That was around eight o'clock in the morning; wasn't it?

THE WITNESS: Yes, sir.

Q. (By Mr. McClelland) Mr. Lavery, at around eight o'clock in the morning of October 10, 1967, what information did you have to seek—behind the affidavit to seek a warrant for Mr. Lewis's arrest, based upon your investigation? A. My probable cause was based on the following facts: First, that a witness who lived near to the scene of this crime had heard shots on the morning of the homicide, and when she looked out the window she saw what she described to me as a gold colored General Motors vehicle leaving the area of the homicide and going south on State Route 315.

Of course Mr. Lewis at that time did in fact own a gold 1966 Pontiac.

On the car of the victim of this homicide, which had been pushed over an embankment at the scene, paint, foreign paint was found on the bumper of that car. From the tire tracks and other evidence at the scene, it was obvious that another vehicle had pushed Mr. Radcliffe's vehicle over this embankment and obviously had been damaged, leaving paint on his bumper.

This foreign paint was removed, samples taken and forwarded to the FBI laboratory. They reported to me

that this paint was—I think they narrowed it down to about a two-year period off of either like '65 or '66 General Motors products, and they gave the factory name for this paint.

For example, on an Oldsmobile it might be called mist gold, whereas on a Pontiac it may have another name, but it was still the same paint.

Among this data furnished me by the FBI, that it could have possibly been a gold colored 1966 Pontiac, so that was another reason.

Probably the biggest reason that I had was that during the course of my investigation I found that a Mrs. Smith, who was the wife of the Mr. Smith who was negotiating to buy Graham Auto Specialties, had received a telephone call on the morning of July 19, 1967, somewhere between the hour of 9:00 A.M. and 9:30, and the caller identified himself as Mr. Radcliffe and said the books for Graham Auto Specialties were A-1; that the business deal should go through. They should go ahead and buy the business and that he, meaning the caller who purported to be Mr. Radcliffe, was leaving town and would not be back until the following week.

Well, my earlier investigation had indicated that Mr. Radcliffe had been murdered at about 8:30. This had been established by the time he left home, how long it would take him to get there, and mostly by the witnesses in the area of the scene who heard the shots, so it was established that he had been killed around 8:30.

This phone call that Mrs. Smith received was some half an hour to 45 minutes later, so obviously Mr. Radcliffe couldn't have made it since he was already dead.

I deduced from that that the person who made the call very likely was the killer, and the only person who would stand to gain from making that call in my opin-

ion was Arthur Ben Lewis, Jr., so these were the reasons that I felt I had probable cause to seek this warrant to arrest.

One other thing too, I am sorry I forgot: I also had information at the time that Mr. Lewis's 1966 Pontiac had been taken into a body shop shortly after the day of this killing for repairs on the front end and parts of the body, the body of the car.

Q. Had you done any investigation in the office of Mr. Radcliffe? A. Yes. Yes, I had been in there many times, and in his records and so forth I of course had found Arthur Ben Lewis, Jr.'s name.

Q. Were there any clues therein specifically that you could recall? A. There was a calendar, a desk-type calendar, and the page for July 19th was missing, but there was an indentation on the next page and this was taken to a laboratory and I think BIC—although it may have been the FBI lab—and their analysis of that indicated that the name Ben Lewis had been written on the page for the 19th.

Q. These, I assume, were then the background facts which led you to believe that Mr. Arthur Ben Lewis had committed the murder of Paul Radcliffe; is that correct? A. Yes, sir.

Q. Calling your attention again to October 10th, 1967 at the Attorney General's Office, Division of Criminal Activities, did you believe Arthur Ben Lewis's car to be an instrumentality of the crime? A. Oh, yes; not just a mode of transportation to and from, but actually involved in the commission of the crime.

Q. Mr. Lavery, if that car had been any place other than a public parking lot, absent his consent to take the car, would you have seized that car? A. Yes, sir, I would have sought it out and seized it at my earliest convenience.

Q. Would you have seized it absent a warrant had it been anywhere other than a public parking lot? A. I possibly would have discussed that with my prosecutor, but I would have seized it. I can't say I would have done it without a warrant. I would have discussed it with my prosecuting attorney first, but I had every intention of seizing it one way or other.

Q. But in any event you did have his consent to take care of the car; is that correct? A. Yes.

* * * * * * * * *

Cross Examination

[144-147]

By Mr. Campbell:

* * * * * * * * *

Q. You say that you would have seized the car in any event. Are you testifying that at the time you went to the Magistrate in Delaware early in the morning of October the 10th, that you at that time already had sufficient evidence to believe that the seizure of that car was justified? A. I felt I probably did, but I wanted to wait until this interview with Mr. Lewis concluded that day to see what developed, and we did in fact of course ask him about the damage to the car and so forth.

Q. Why didn't you apply for a search warrant at the same time? A. As I say, I wanted to wait until after this interview and see if my opinion changed either one way or other regarding the car.

* * * * * * * * *

THE COURT: What developed in the course of your investigation on October the 10th that strengthened your belief that Lewis's car was an instrumentality of the crime and therefore under any circumstances you would seize it?

THE WITNESS Well, he admitted that it had been damaged, and he told us that it had been done while parked on a street. In fact I think on Third Street or perhaps in the alley behind Third Street. He admitted that it had been damaged.

Our prior investigation at the body shop where he took it indicated that when the employees there asked him how this damage occurred, he said, "My wife hit a fence."

THE COURT You knew that he had taken it to a body shop before you started to question him on October the 10th; didn't you?

THE WITNESS: Yes, sir.

Supreme Court of the United States

No. 72-1603

Harold J. Cardwell, Warden,

Petitioner,

v.

Arthur Ben Lewis

ORDER ALLOWING CERTIORARI. Filed December 3 ---------- , 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.

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No. 72-1603

IN THE

Supreme Court of the United States

October Term, 1972

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Harold J. Cardwell, prays that a Writ of Certiorari issue to review the judgment and final order of the United States Court of Appeals for the Sixth Circuit entered on April 5, 1973, which judgment affirmed the granting of the writ of habeas corpus to respondent by the United States District Court for the Southern Division of Ohio, Eastern Division.

OPINIONS BELOW

The opinion of the United States District Court appears at page 35, *infra*. The opinion of the United States Court of Appeals, Sixth Circuit, affirming the district court appears at page 27, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of §1254(1), Title 28 U.S.C.; and pursuant to Rule 19(b) of the Supreme Court Rules. Petitioner believes that the decision of the Court of Appeals is in conflict with the decisions of this Court and raises an important question of Federal law which should be decided by this Court.

QUESTION PRESENTED

Should a federal court invalidate the admission of the evidence in a state criminal prosecution when the record shows that the evidence was seized as an instrumentality of the crime incident to the defendant's arrest which seizure was necessitated by exigent circumstances?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 8, 1967, the Delaware County Grand Jury returned an indictment charging respondent with murder in the first degree in violation of §2901.01, Ohio Revised Code. He was tried before a jury on March 4-21, 1968, and found guilty with the recommendation of mercy. On March 29, 1968, he was sentenced to a term of life imprisonment in the Ohio Penitentiary.

Respondent appealed his case directly to the Fifth District Court of Appeals for Delaware County which affirmed the judgment of conviction on February 6, 1969. Thereafter, respondent appealed to the Supreme Court of Ohio which affirmed his conviction on May 13, 1970. See *State v. Lewis*, 22 O.S. 2d 125.

Respondent then filed a Petition for Writ of Certiorari in the Supreme Court of the United States. Included among those questions presented by that petition was the following question:

"Were appellant's (sic) rights under the Fourth and Fifth Amendments abridged where appellant's automobile, parked on a private lot one-half block from site of appellant's arrest, was seized and searched without legal process of any kind — even though appellant had been out of the automobile for over eight hours — and where the fruits obtained by

such search were received in evidence at appellant's trial in the state court?"

This Court denied the Petition for Writ of Certiorari. See *Lewis v. Ohio*, 400 U.S. 959 (1970).

In April of 1971, respondent filed a petition for the writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division alleging the following as a basis for his claim for relief:

1) His arrest was unlawful because it was predicated upon a warrant that had issued under §§2935.09, 2935.10, 2935.17 and 2935.19 of the Ohio Revised Code, which sections are unconstitutional on their face in that they;
   a) fail to provide that a judicial determination be made prior to issuance of a warrant;
   b) fail to provide that facts be set forth in the affidavit that would permit an impartial judicial determination as to the existence of probable cause for issuance of the arrest warrant;
   c) fail to require the officer to state his source, or to aver that such source had previously been reliable.

   The subsequent eliciting of the petitioner's statements and the seizure of his automobile incident to the arrest when entered as evidence in the trial of this cause served as a basis for his conviction, contravening the petitioner's rights under the Fourth and Fourteenth Amendments.

2) His interrogation and subsequent arrest and seizure of his automobile by a vigilante committee (Division of Criminal Activities — ostensibly at the direction of Deputy Sheriff Lavery) was in violation of his right of Fourteenth Amendment's procedural due process, where

such committee, assigned by the Ohio Attorney General, was, in actual point of law, operating without legal authority where the Attorney General had no such statutory appointive powers and the subsequent seizure of evidence as a result of this action by the Attorney General when entered as evidence during the trial of this matter served as a basis for petitioner's conviction.

3) His Fifth Amendment rights were infringed where the vigilante committee (Division of Criminal Activities) summoned the petitioner to the Office of the Attorney General, initiated an interrogation of the petitioner prior to having given him the warning required by Miranda, and that when the purported warning was given, he was not apprised of certain facts, i.e., that anything said can and will be used against him in court, or that an arrest warrant had been issued for his arrest, or that his conversation, prior to the warning as well as after, was being monitored by a hidden electronic eavesdropping apparatus thereby denying the petitioner his Sixth Amendment right to counsel during a critical stage of the proceedings, and the surreptitiously acquired statement when entered as evidence in the trial of the cause served as a basis of his conviction.

4) He was deprived of a fair trial where after the trial court overruled State's Exhibit III, the trial court erred in permitting the State to present into evidence the hearsay contents of the exhibit in toto, by means of a witness for the State reciting verbatim therefrom; such testimony serving as a basis for conviction and violation of petitioner's rights under the Sixth and Fourteenth Amendments.

5) The warrantless seizure of his automobile, parked on a private lot one-half block from site

of his arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's case), further, the automobile was not seized contemporaneous in time and place with petitioner's arrest, and evidence seized therefrom served as a basis of his conviction.

6) He was deprived of any chance he may have had for a fair trial where a woman, whom the State alleged, by pre-trial press releases, was his "second wife," was issued a subpoena by the State in such flamboyant manner as to maximize newspaper, radio and television coverage and, where, this "witness" was never called to testify; and where the State with manifest intent, branded the petitioner as a "beast" in the eyes of the jurors, by parading her through the courtroom after the jury was seated, and kept her within the eyesight of the jury by the seating arrangement provided by the State of Ohio; hence, the misconduct by the Office of the Prosecuting Attorney in perpetuating the prejudicial publicity which was crucial to, and denied the petitioner's right to a fair trial and served as a basis of his conviction by denying him the right of due process under the Fourteenth Amendment.

7) Hearsay evidence of the most flagrant kind was adverted to with the manifest intent of depriving him of his right to a fair trial where the contents of an unrelated telephone call was admitted under the trial court's misinterpretation of the hearsay rule and constituted a deprivation of petitioner's right of confrontation and cross-examination under the Sixth Amendment.

8) His right to a fair and impartial trial by a jury free of prejudice was impaired where evidence,

known to be incompetent when offered, was wrongfully admitted for consideration of the jury and served as a basis of conviction violating the petitioner's constitutional rights as provided by the Fourteenth Amendment.

9) The trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial and served as a basis of his conviction, depriving him of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment's right to due process.

10) The trial court's denial of his Motion for a New Trial based upon newly discovered evidence was a flagrant abuse of the discretion lodged in that court and served to perpetuate petitioner's imprisonment for a crime of which he is innocent, denying him due process under the Fourteenth Amendment.

Following the filing of a Return of Writ and appointment of counsel, an evidentiary hearing was held on April 20, 1972.

Thereafter, on May 19, 1972, the court issued an Opinion and Order finding nine of the ten issues to be without merit. (See Appendix) However, as to issue five, the court found that respondent had been denied due process of law and ordered "that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioner be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials initiate action for a new trial, it is ORDERED (sic) that no writ of habeas corpus shall issue."

Petitioner then filed a timely Notice of Appeal and obtained a Stay of Execution. Oral argument was heard by the United States Court of Appeals for the Sixth Cir-

cuit on December 8, 1972 and on April 5, 1973, the Court of Appeals issued its decision affirming the Opinion of the District Court. (See Appendix) It is of this Opinion from the Court of Appeals which petitioner seeks the Writ of Certiorari.

STATEMENT OF FACTS

At the trial of respondent, one Steven Molnar, Jr., a laboratory technician and firearms examiner for the Ohio State Bureau of Criminal Identification and Investigation, testified for the State. He testified as to his opinion of the type of tire that made certain tracks at the scene of the homicide of July 19, 1967, for which respondent was charged. Furthermore, he testified as to his opinion regarding samples of paint scraped from respondent's automobile, which had been impounded.

Initially, he testified that he took paint scrapings from respondent's car while it was at the Columbus Police impounding lot. He also said that he had paint scrapings which had been taken from the murder victim's car, which, it was thought, was pushed over the river bank at the scene of the crime, by another car. This examination occurred on October 11, 1967, and the paint was taken from the right rear and the left front of respondent's car, and from the right rear fender and the right side of the rear fender of the victim's car for purposes of comparison. He went on to testify that, in his opinion, there was

> " . . . no difference in color, texture, or order of layering of the paint samples that I was comparing." (Bill of Exceptions, p. 221)

Furthermore, the color of paint was the same.

The paint samples from respondent's car and testimony were admitted over objection.

There was, however, a pre-trial hearing on a motion to suppress filed by respondent. The motion concerned the evidence and testimony referred to above. The hearing was held in the trial court on January 25, 1968. Testifying were Clyde Mann, then Chief Investigator for the Division of Criminal Activities of the Attorney General of Ohio, David Tingley, Attorney at Law, and Sgt. William Lavery, of the Delaware County, Ohio, Sheriff's Office.

Facts adduced at this hearing were as follows:

Respondent was interrogated in the office of the Attorney General, 40 S. Third Street, Columbus, Ohio, on October 10, 1967, pursuant to a request to come to the office. He was served with an arrest warrant and placed under arrest late in the afternoon, after which his car was impounded by the Columbus, Ohio, Police Department.

Mr. Mann testified at the hearing that present during the interrogation of respondent of October 10, 1967, in the Attorney General's Office, were Lavery, Jim Heise, David Kessler, Ed James, respondent and himself. He said that he told respondent, after he was arrested, that he, Mann, was going to impound respondent's car because it was used in a felony, and that he had no warrant. On direct examination, Mr. Mann revealed that respondent asked him to have his car impounded or put in a police lot for safekeeping.

Next to testify was David E. Tingley, Attorney at Law, who testified that he witnessed the facts surrounding the seizure of the automobile. He testified that at about 5:30 p.m. on October 10th, respondent was in custody and

that Clyde Mann indicated to Mr. Scott that he wanted possession of some books and records respondent brought with him as well as the automobile, because it was used in the commission of a felony. Scott then, according to Mr. Tingley, said that he would not enter into a physical fight over the car and gave the keys to Mann. He then got the parking ticket from respondent and gave it to Mann.

Next to testify was Sergeant William Lavery. He stated that he obtained a warrant for respondent's arrest on the morning of October 10, 1967. Furthermore, he stated that he requested Mr. Mann to have the automobile impounded but that, according to his recollection, respondent had asked the officers to watch the car as he was concerned about it.

The trial court made the following finding:

> "In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was arrested."

At the evidentiary hearing of April 20, 1972, in the court below, there was much testimony concerning the alleged illegal search and seizure. Paul Scott, defense counsel at the trial, testified that respondent gave him the keys to his car shortly before or subsequent to his being arrested, with instructions to return the automobile to his (respondent's) family. He also gave Scott the parking lot claim ticket. Furthermore, after Scott's arrival at the Attorney General's Office and after a conference with respondent, the arrest warrant was served on respondent. After that, according to Scott, Clyde Mann

confronted Scott and demanded respondent's briefcase and automobile. Rather than get into a physical confrontation with Mann, Scott relinquished the keys and the claim check to Mann with the admonition that he would see Mann "in court on a Motion to Suppress on that." (Transcript of evidentiary hearing, p. 28)

On cross-examination, Mr. Scott testified that, although there was no real threat from Mann, he did not willfully turn the automobile over to Mann, that it was done under protest, subject to what would happen in a court of law. (T., pp. 47-48)

Sergeant Lavery testified first for the respondent. He stated that, prior to the actual seizure of the car, he did know the description of respondent's car, that on the day of the seizure he had no search warrant, and that respondent asked that his car be taken care of. (T., pp. 76-78) The Columbus police actually towed the car.

On cross-examination, he stated that he believed the request by respondent that his car be taken care of was made about 5:00, while Mr. Scott was present. He further said that, in his opinion, respondent's request was a general request made of no one in particular. He could recall no discussion between Scott and Mann relative to the car. He also stated that he did not know that respondent's car was parked on the lot south of the Attorney General's Office. (T., p. 92)

Respondent himself was next to testify on the issue of illegal search and seizure at the evidentiary hearing. He testified that he drove to the attorney general's office and parked on a parking lot near that office. He also denied that he asked anyone from the attorney general's office to remove his car saying that he gave his keys and claim check to Paul Scott before he was arrested so that

Scott could take the car home for respondent's family's use. Furthermore, he testified that the police officers did have a description of his car.

Clyde Mann was the first witness for petitioner to testify relative to the search and seizure issue. He testified again that respondent requested Mr. Mann to take care of his car and claim ticket. Furthermore, this occurred at approximately 5:00 p.m., on October 10, 1967, in the hallway inside the attorney general's office and that, to the best of his knowledge, the claim check was handed directly to him by respondent. This confrontation apparently occurred close in time to Mr. Mann's request of Scott for possession of respondent's briefcase. Mr. Mann also again testified that he believed the car was used in the commission of the crime and for this reason wanted the car.

Sergeant Lavery was called by petitioner as his witness and testified on direct examination. He testified as to facts he had in his possession on October 10, 1967, relative to respondent's involvement in the crime and the role his automobile played in the commission thereof. (T., pp. 139-142, 147)

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT THAT PAINT SAMPLES TAKEN FROM RESPONDENT'S AUTOMOBILE WHICH HAD BEEN LEGALLY SEIZED AS INCIDENT TO HIS ARREST WERE ADMITTED IN EVIDENCE AT RESPONDENT'S TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The United States District Court authored a lengthy analysis of the allegation that admission of certain paint scrapings at trial against respondent was violative of the Fourth and Fourteenth Amendments. The court concluded that the evidence was not seized as incident to a valid arrest, that respondent did not consent to its seizure, and that the search was not justified as having been seized in "plain view." The court of appeals indicated it was in "full agreement" with this opinion. Petitioner submits such a conclusion was erroneous.

Petitioner initially notes that the evidence complained of by respondent in the courts below was paint scrapings taken from the exterior surface of his car while it was in the Columbus, Ohio, police impounding lot. No evidence was admitted as a result of any intrusion to the car's interior.

Petitioner contends, therefore, that such paint scrapings were properly admitted against respondent at trial as such scrapings were the result of a scientific examination of an instrumentality of the crime for which respondent was arrested. Cf: *Cotton v. United States*, 371 F. 2d 385 (9th Cir., 1967); *United States v. Graham*, 391 F. 2d 439 (6th Cir., 1968), wherein it is stated at page 442:

> "While it is true that the Constitutional proscription against unreasonable searches and seizures extends to automobiles, since they, like houses, legitimately serve as repositories for personal effects and belongings of the owners and occupants, this is immaterial to the question presented at bar. No articles of evidence separate from and independent of the cars themselves were obtained as a result of the police examination, as was true in such cases as Preston v. United States, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed.

> 2d 777 (964), and Cooper v. State of California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)."

See also, *United States v. Wade*, 457 F. 2d 828 (7th Cir., 1972); *United States v. Dadurian*, 450 F. 2d 22 (1st Cir., 1971); *Lundberg v. Buckhoe*, 338 F. 2d 62 (6th Cir., 1964).

Even assuming that this examination did constitute a search within Fourth Amendment contemplation, which petitioner denies, such was valid as

> ".... the search of the car - - - whether the state had legal title to it or not - - - was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." *Cooper v. California*, 386 U.S. 58 (1967).

The record clearly indicates that the inspection of respondent's car was consistent with the reason the car was impounded and with the reason for which respondent was arrested. No intrusion was made to the interior and no general exploratory search for evidence of any kind complained of in the courts below was conducted. The car itself was evidence and the police had complete dominion and control over it. As such, there could be no further trespass committed by a subsequent examination.

Under the circumstances, therefore, it cannot be said that the inspection and examination of the paint samples in question for purposes of identification, which identification was consistent with the reason the car was seized, was unreasonable. See, *United States v. Powers*, 439 F. 2d 373 (4th Cir., 1971); *United States v. Johnson*, 413 F. 2d 1396 (5th Cir., 1969).

In its simplest form the situation presented here involves the propriety of the examination of a piece of evidence after seizure. The case of *People v. Teale*, 450

P. 2d 564 (Cal., 1969) speaks to this proposition at footnote 10, p. 572:

> "Only an object reasonably believed to be itself evidence of the charged crime is subject to seizure and, therefore, to detailed examination subsequent to seizure."

Respondent's automobile was reasonably believed to have been evidence of the crime itself. (See, pp. 139-142, 147, transcript of the evidentiary hearing.)

An analogous situation would be where perhaps a gun believed to have been a murder weapon, or blood-stained clothing believed to have been worn by a suspected offender were in police possession. Can it be doubted that the police have every right to examine such items consistent with the reasons they were seized? Obviously not. Such, then, is the instant situation.

As to the seizure of the car, it must first be noted that "automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968). See also, *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925). Petitioner submits that such a proposition is equally applicable to seizures of automobiles as it is to searches. Accordingly, the seizure of the automobile was necessitated by the exigencies of the situation compounded by the fact that the item or evidence to be seized was a large, readily mobile entity such as an automobile.

Additionally, at the time of the seizure and at the time of the trial, the "relevant test (was) not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz*,

339 U.S. 56 (1950). Petitioner submits that the actions of the investigating authorities were at all times reasonable and consistent with respondent's Fourth Amendment protections.

The record from the trial court and the record from the district court shows that respondent relinquished possession of the keys and claim check to his car which was parked approximately one-half block away. He gave the keys and claim check to his attorney, Paul Scott, who then turned them over to the investigating authorities under circumstances found not to have constituted consent. These events occurred at the attorney general's office at 40 S. Third Street, Columbus, Ohio.

Petitioner submits that the seizure of those items at that time constituted the intrusion into respondent's Fourth Amendment protected area, which intrusion was justified as being incident to the valid arrest of respondent. By seizing the keys and the claim check at that time, respondent's control and dominion over the car effectively ceased. Quite obviously, without either of these items, the complete use of the automobile by respondent was tremendously, if not completely, limited. Respondent's "possession" of the car was dependent upon the keys and claim check.

Of equal effect would have been the only other practical alternative available to the investigating authorities at the time; that being to have placed a guard at the car and make it inaccessible to Scott until a warrant could be obtained to remove the car. In either case, an intrusion into respondent's Constitutionally protected domain would have occurred, either of which would have been justified. This Court has spoken to the practice of allowing a "lesser" intrusion to justify a "greater" intrusion of an individual's Fourth Amendment rights:

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney*, 399 U.S. 42, at 51-52 (1970).

The actions of the investigating authorities were justified as being incident to a valid arrest, having occurred at a place and time contemporaneous with the arrest. *Preston v. United States*, 376 U.S. 364 (1964). The seizure of the car at that time was necessitated as the authorities had reason to believe that a very valuable piece of evidence was likely to be moved or destroyed. The record bears out their fears.

At the time of the seizure of the keys and the claim check, Paul Scott was zealously protecting the rights of his client and the property of his client. In that pursuit he felt constrained to vigorously object to the seizure of respondent's briefcase and car. There could be no doubt that he was going to comply with his client's wishes regarding the automobile regardless of the desires of the authorities. (T., pp. 26, 45-46)

The authorities had cause to believe that respondent had on prior occasions concealed or destroyed evidence. (T., p. 141; Bill of Exceptions, pp. 500-504, 515-516, 274-275, 213, 545-548) Also during the interrogation session

of October 10, 1967, in the attorney general's office, respondent was made acutely aware of how the authorities felt the car figured into the crime and what part of the car was thought to have been used. There was no reason to think that respondent could not have contacted someone, friends or family, with instructions to repair those portions of the automobile immediately. In any event, there was no reason, under all of the circumstances, for the police to have been required to speculate about what might take place or what might happen to the evidence.

The United States District Court correctly says, at page 22 of its Opinion and Order, that a warrantless search incident to arrest may be justified if

> "[t]he vehicle is mobile, and if officers delay to obtain a search warrant, one of defendant's confederates will remove the automobile and prevent the police from searching for the object or objects subject to seizure."

Petitioner does not intend to characterize Paul Scott as a "partner in crime" by implying he was respondent's confederate. Such is not necessary. The fact is he was going to do with the car what respondent wanted done with it, while acting in the role of respondent's protector. For the police to have required anything less of him, including relinquishing the keys and claim check, would have constituted an invasion into respondent's control and dominion over the automobile, which under the circumstances would have been justified.

The district court found that there was no facts present to justify the seizure, an opinion joined in by the court of appeals. However, petitioner contends that it was those facts, as set out above, which constituted the very real prospect of destroyed or at least moved evi-

dence which necessitated the seizure of the car in the manner and method it was seized and at the time it was seized. The facts, which are largely uncontradicted, are ignored by the courts below yet were apparently given much consideration by the trial court, who was in the best position to make the most valid judgment. The courts below are clearly in error. Cf., *LaVallee v. Rose*, —— U.S. ——, 35 L. Ed. 2d 637 (1973).

The record from the District Court clearly affirms the fears of the authorities at the time of the seizure, when Paul Scott reiterates that his sole purpose in having possession of the keys and claim check was to move the car subject to his client's wishes.

Yet it is not surprising that the Courts below would chose to ignore these uncontradicted facts. Both courts were laboring under a misapprehension regarding the necessity of a warrant. Both courts seem to believe that because a warrant *might* have been readily obtained to effectuate a seizure at an earlier time, the conditions otherwise justifying a seizure as incident to a valid arrest are either absent or of no force or effect. Petitioner does not understand this to be the crux of the law relating to the validity of a search incident to a valid arrest. The district court delineates at p. 22 of the Opinion and Order two conditions, one or both of which must be met, before a search can be justified as being incident to an arrest:

> a. The circumstances establishing probable cause for search of the vehicle were unknown to the police prior to the defendant's apprehension.
>
> b. The vehicle is mobile, and if the officers delay to obtain a search warrant, one of defendant's confederates will remove the automobile and prevent the police from searching for the object or objects subject to seizure.

The court obviously considers the fact that a warrant could have been obtained to be the primary reason condition b., above, was not met. As stated above, there is no doubt that the car would have been moved thereby preventing the police from seizing the evidence and subjecting such evidence to possible destruction. This is the crux of the seizure of respondent's car as incident to his arrest. Bear in mind that it is not disputed that the authorities had probable cause to believe that the car played a role in the murder for which respondent was charged. (T., pp. 139-142, 147)

Whether or not the seizure of respondent's car can be justified as incident to his arrest, there is no doubt that the seizure can nevertheless be justified on the basis of the existence of probable cause to seize the automobile. *Chambers v. Maroney, supra*; *Carroll v. United States*, 267 U.S. 132 (1925). "Exigent circumstances" appear to justify the seizure in this regard considering also the very mobile nature of an automobile. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Petitioner, therefore, submits that "exigent circumstances" justified the seizure of the automobile in the instant situation, and a finding otherwise by the courts below was clearly erroneous.

But, again, it is not surprising that the courts below would ignore those facts constituting the "exigent circumstances", for these courts again appear to have been preoccupied with the possible opportunities the authorities might have had to obtain a warrant.

It cannot be doubted that the quantum of pre-seizure information known to the authorities at the time of the seizure, especially considering the unsatisfactory answers to questions regarding damage to his car given by respondent during the interrogation of October 10,

1967, established probable cause to seize the car when the authorities did. *United States v. Rodgers*, 442 F. 2d 902 (5th Cir., 1971). The "exigent circumstances", justifying seizure at that time have been reviewed already in this argument. Briefly, they include the fact that Mr. Scott most definitely would have moved the car to wherever he or respondent desired. The police suspected respondent of concealing evidence on prior occasions. It is notable that respondent at the time had many bases of operations including his home and businesses where he might have legitimately put his car. These places included locations in Franklin and Delaware Counties.

Petitioner submits that what opportunity the authorities had to secure a warrant prior to the seizure of the car is not particularly relevant to the existence of "exigent circumstances". Petitioner does not intend to derogate the necessity of a warrant or the judgment of a detached and neutral magistrate in determining the existence of probable cause, but we do contend that, even assuming a warrant may have been obtained at an earlier time, such does not attenuate the urgency of a warrantless seizure at a later time, when probable cause still exists for the seizure and it is otherwise justifiable.

If it is feared that the authorities either by design or by negligence failed to get a warrant at an earlier time so they could seize the car at the time of his arrest without the intervention of a magistrate's judgment, such fears are not well taken. First, the authorities are taking a great chance the evidence will be destroyed or otherwise made unavailable to them while they delay. In any event, if they did have facts sufficient to establish probable cause in the mind of a magistrate, of what value would it be for them to fail to obtain a warrant at that time? Bear in mind that the seizure in question still

requires probable cause. The rewarding of devious police practices is not to be feared by upholding the seizure in question.

In any event, petitioner contends it is at least questionable that a search warrant could have been obtained prior to the seizure. Admittedly, the authorities did suspect the car played a role in the crime for some time prior to its seizure. Admittedly, the authorities had knowledge of the identity of respondent's car. However, these facts alone are hardly enough to believe a warrant may have been issued.

The fact that the authorities obtained an arrest warrant on the morning of October 10, 1967, prior to interrogating respondent is of little consequence. Note that the arrest warrant was obtained in Delaware County, Ohio and the interrogation was going to take place in Columbus, Franklin County, Ohio. The Municipal Court in Delaware, Ohio has no jurisdiction to issue search warrants for Columbus, Ohio. See, §2933.21, Ohio Revised Code.

The courts below also assume that during the entire period of time on October 10, 1967 that respondent was at the attorney general's office, it was known to the authorities that respondent drove the car in question to the office and that he parked the car on the parking lot from which it was seized. The implication from this is that they could have obtained a warrant in the course of the day. However, there is no support in the record for the conclusion that the location of the car was known to the authorities. In fact, there is uncontradicted support for the contrary. Sgt. William Lavery of the Delaware County Sheriff's Office testified as follows at page 92 of the transcript of the evidentiary hearing:

"The Court: Did you know this car was parked on the lot south of the office?
The Witness: No, I didn't know that and I don't believe Mr. Mann did. I didn't know it personally.
The Court: You say you didn't?
The Witness: I did not."

As recently stated by this Court in *Cady v. Dombrowski*, —— U.S. ——, 37 L.Ed. 2d 706, the question in this case was whether the search was unreasonable solely because the local officer had not previously obtained a search warrant. In *Cady* after citing several cases dealing with the search of an automobile seized and searched without a warrant by the police, this Court stated:

> "The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, see Cooper, supra, Harris, supra, Chambers, supra, and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments."

Petitioner believes that the conditions surrounding the search and seizure in this case are not unlike those in *Cady*.

For the foregoing reasons, petitioner submits that the finding that there were no "exigent circumstances" justifying the seizure of respondent's car with the resultant finding that the seizure of the automobile violated respondent's Fourth Amendment rights was clearly erroneous.

CONCLUSION

Petitioner feels that the Courts below have improperly gauged the impact of *Coolidge v. New Hampshire*, *supra*, and *Cook v. Johnson*, 459 F. 2d 473 (6th Cir., 1972) in the process of invalidating the seizure of respondent's automobile. While on the surface both cases seem to be factually in point with the instant situation, and while the state has, in all the cases, attempted to justify the search for a number of similar reasons, there are significant factors in both, which factors are not present in the instant case, and which make the instant seizure allowable. In both cases an individual's private property was entered and taken therefrom, in each case, was the individual's automobile where there was no prospect the automobile was about to be moved. Petitioner would not contest if respondent's car had been seized from his private property where there were no real prospect of the car being moved.

In the instant situation, the intrusion into respondent's control over his car was not dependent upon an invasion of his physical premises. The car itself was seized from a public parking lot, upon which police needed no specific authorization to enter.

In neither of the two cases was there any significant prospect of the car in question being moved while in the instant situation such was actually a certainty. While the authorities had information relating to the car, prior to the seizure, there is no indication such information amounted to probable cause to obtain a warrant. Nor can it be said that on the morning of the interrogation it was reasonable to procure a warrant considering the mobile nature of the item to be seized and the uncertainty of its location at any particular time. Petitioner believes rather, that the decision in *Cady v. Dombrowski, supra*, should govern this case.

Accordingly, petitioner submits that the admission of the paint scrapings in question were admitted at respondent's trial without violating his rights under the Fourth and Fourteenth Amendments to the Constitution. A finding to the contrary by the courts below and the granting of the Writ of Habeas Corpus were conclusions clearly erroneous.

Lastly petitioner iterates that the question of the legality of the seizure of the paint samples was, after a motion to suppress and *voir dire* hearing, determined by the trial court. The question was raised by respondent and rejected by two Ohio appellate courts and this Court. Petitioner believes that the district court was in error in relitigating the matter. As enunciated by Mr. Justice Powell in his concurring opinion:

> "Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting

> the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system." *Schneckloth v. Bustamonte*, ___ U.S. ___ 36 L. Ed. 2d 854, 855 (1973).

See also: *Cupp v. Murphy*, ___ U.S. ___ 36 L.Ed. 2d 900 (1973).

Wherefore petitioner prays that this Court grant the writ of certiorari sought herein.

Respectfully submitted,

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LEO J. CONWAY,
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Assistant Attorneys General,
Attorneys for Petitioner.

APPENDIX A

OPINION OF THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

ARTHUR BEN LEWIS,
Petitioner-Appellee,

v.

HAROLD J. CARDWELL, Warden,
Respondent-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed April 5, 1973.

Before: PHILLIPS, Chief Judge, WEICK and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal is before the Court for review of a judgment and order of the district court conditionally granting a writ of habeas corpus pursuant to the power vested in that court by 28 U.S.C. §2241.[1]

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[1] The district court opinion states:

Accordingly, it is ORDERED that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioned be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials initiate action for a new trial, it is ORDERED that no writ of habeas corpus shall issue. *Lewis v. Cardwell*, —— F. Supp. —— (S.D. Ohio 1972)

The case arises from a brutal shotgun slaying for which the appellee, Arthur Ben Lewis, Jr., was indicated, tried and subsequently found guilty of first degree murder by a state trial court jury. It is well to remember that this Court's sole duty in this case, as in all similar cases, is to determine whether the petitioner's constitutional rights were violated, regardless of the evidence pointing to the guilt of the accused.

The single issue presented for resolution is the correctness of the District Court's holding that the appellee's fourth and fourteenth amendment rights were violated by the admission at his trial of evidence obtained from a warrantless seizure and subsequent search of his automobile. The District Court's exhaustive and comprehensive opinion is reported in —— F. Supp. —— (S.D. Ohio 1972). Since we are in full agreement with the opinion, we find it unnecessary to do more than to emphasize and further clarify several points made below. Only the skeletal facts relevant to the single search and seizure question need be summarized here.

During the course of investigating this July 19, 1967, slaying, the law enforcement officers focused their attention on the appellee. On July 24, 1967, Delaware County Deputy Sheriff Lavery, one of the officers assigned to the case, talked with the appellee at his place of business and at that time viewed his 1966 Pontiac automobile. From other information gathered in the investigation Lavery believed that the appellee's car had been used to push the murder victim's automobile over a river embankment at the scene of the crime. On September 28, 1967, Deputy Lavery and an official from the State Attorney General's office again interviewed the appellee and on October 9, 1967, the appellee was contacted by telephone and requested to appear the next day at the

offices of the Division of Criminal Activities in Columbus, Ohio, for further questioning. Early the next morning, October 10, 1967, Deputy Lavery obtained a warrant for the appellee's arrest but did not attempt to procure a warrant for the search of his car.

The appellee arrived at the offices of the State Attorney General shortly after 10:00 A.M. October 10, 1967, where several staff members of the Division of Criminal Activities and Deputy Lavery questioned the appellee for a substantial part of the day. The arrest warrant was not served on the appellee until approximately 5:00 P.M. that afternoon, an event which occurred shortly after the arrival of his attorneys. Around the time of appellee's arrest the law enforcement officials obtained the keys and the claim check for the appellee's car which was parked in a pay parking facility about a half block from the state offices.[2] One of the state officials then called a wrecker to seize the automobile. The seizure was effected in this manner, with the result that none of the investigators personally viewed the vehicle or ascertained whether the car was in fact parked in the lot. The seizure was made without obtaining a warrant.

A lab technician viewed the car in the impounding lot on October 11, 1967, and searched the trunk of the car. He also removed paint samples from the exterior surface of the appellee's automobile, consisting of the outer coat of paint and the two primer coats underneath. At the appellee's trial this technician testified that he found no difference in the color, texture or the order of layering

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[2] The district court found that the keys were actually obtained from the appellee's attorney who relinquished them to the state officials under protest to avoid a physical confrontation. The full details of this incident are recounted in the lower court's opinion. What is important for our purposes is that the court found that the appellee did not consent to the seizure and search of his automobile. This finding is not clearly erroneous.

of paint of these samples as compared with foreign paint marks found on the victim's car.

The respondent raises three grounds in attempting to support the warrantless seizure and subsequent search of the appellee's automobile: first, that the search of the automobile was with the consent of the appellee; second, that the search was incident to a valid arrest; and third, that the vehicle itself was an instrumentality of the crime in plain view which the officers had probable cause to believe was used in the commission of a felony. As a corollary to the third contention, the respondent claims that no search was in fact conducted since no items were seized from the interior of the car but rather that the paint scrapings were removed from the exterior surface of the vehicle as a result of a scientific examination of an instrumentality of the crime.

The district court's finding, which we deem to be correct, that the first two contentions were without merit is so fully discussed in its opinion that nothing further need be said with respect to these issues. We confine ourselves to some additional observations concerning respondent's third contention.

Initially, what may be termed a point of semantics needs clarification. The respondent's use of the term "instrumentality of the crime" is an attempt to raise the ghost of an outmoded concept which was laid to rest by the Supreme Court in *Warden v. Hayden*, 387 U.S. 294 (1967), where the Court dispensed with the "mere evidence" distinction which had worked its way into the law of search and seizure. Mr. Justice Brennan's words deserve repetition:

> Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or

> contraband. On its fact, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects . . .," without regard to the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another. 387 U.S. at 301-302.

Mr. Justice Stewart also reiterated the demise of the "instrumentality of a crime" and "mere evidence" distinction in *Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971).

The respondent's third contention is thus premised on an unwarranted assumption. As aptly stated by the district court: "The instrumentality theory assumes that any object used in the commission of a crime may be seized *at any time* without a warrant as long as the officers have probable cause to believe that the object was used in the commission of a crime and the officers are lawfully in a position to view the object." —— F.Supp. at ——. We fully approve the district court's answer to this premise: "The police cannot seize an automobile on the theory that it is an instrumentality of a crime which is in plain view in calculated disregard for the Fourth Amendment requirement that application be made to a judicial officer for a search warrant absent exigent cir-

cumstances." —— F.Supp. at ——. Since no exigent circumstances existed in this case the respondent's instrumentality theory must fail.[3]

The district court indicates that for purposes of deciding the case it is "assuming" that the officers were in a position legally to apply the plain view exception to the warrant requirement. However, the facts of this case clearly establish that event though the officers had probable cause to seize appellee's automobile they in fact never observed the vehicle at all but rather merely dispatched a wrecker to the site where they believed the car was parked. Stated in its simplest form there can be no "plain view" when there is no "view" at all. To attach such an extension to the plain view exception to the warrant requirement would undercut the very foundations of fourth amendment protections and consequently such a proposition is untenable. It is for this very reason that Mr. Justice Stewart, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), emphasized the importance of inadvertence in discovering the evidence when applying the plain view doctrine. We are in accord with this reasoning.[4] Hence, when law enforcement officers

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[3] The district court spells out the lack of exigent circumstances at several points in its opinion. Of particular significance is the fact that the police had planned for several weeks to seize the vehicle but made no effort to obtain a warrant.

[4] The Court is cognizant of the fact that Part II C of Mr. Justice Stewart's opinion was only concurred in by three other justices. However, another justice, Mr. Justice Harlan did concur in the judgment in that case and consequently the evidence seized from the Coolidge automobile was suppressed. Further, Mr. Justice Harlan concurred in Part II D of Mr. Justice Stewart's opinion, a section specifically designed to counter the arguments "that can be made against our interpretation of the 'automobile' and 'plain view' exceptions to the warrant requirement." *Coolidge v. New Hampshire*, 403 U.S. 443, 473 (1971).

This Court has accepted the full reasoning of Mr. Justice Stewart's opinion concerning the plain view and automobile exceptions just last year in *Cook v. Johnson*, 459 F.2d 473 (6th Cir. 1972). We reaffirm the correctness of that position. *See* Annot., 29 L.Ed.2d 1067, 1073-78 (1972).

have prior knowledge amounting to probable cause establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the fourth amendment principle that warrantless seizures are *per se* unreasonable in the absence of exigent circumstances.

The respondent's contention that no search was in fact conducted of the vehicle because the paint scrapings were removed from the exterior surfaces of the car during a scientific examination of evidence of the crime is also untenable. This reasoning is unsound because it is based on the premise that the car was properly seized without a warrant — a contention which we have held to be incorrect under any of the theories advanced by the respondent.[5] Also we cannot agree that standing alone, the police actions involving the vehicle were not a search. As correctly stated by the district court in footnote 10 of its opinion:

> Respondent also apparently argues that there was no search and seizure because the only thing seized — paint — was from the exterior of the car. No cases are cited supporting this novel proposition. Admittedly, testimony describing the exterior color of the car would not run afoul the Fourth Amendment if the witness had lawfully been in a position to observe its color. However, the intrusion herein was not limited to an observation of the exterior of the automobile. A search was conducted of the lay-

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[5] This same error appears in the Ohio Supreme Court's opinion on the appellee's appeal, *State v. Lewis*, 22 Ohio St. 2d 125, 258 N.E. 2d 445 (1970). There the court, relying on *People v. Teale*, 70 Cal.2d 497, 450 P.2d 564 (1969), upheld the search as proper since the car was an instrumentality of the crime. However, the Ohio Supreme Court failed to note that in *Teale* the initial seizure of the automobile was justified as being incidental to the defendant's arrest.

Respondent's reliance upon *Cooper v. California*, 386 U.S. 58 (1967) is misplaced since the underlying premise of the Supreme Court's holding in that case was that the initial seizure of the vehicle was properly made pursuant to the California Narcotics statute, providing for seizure and forfeiture proceedings. Therefore, the seizure was not constitutionally infirm.

ers of paint beneath the visible surface of the vehicle. —— F.Supp. at ——.

In our view the action of the police lab technician in lifting the layers of paint from the exterior car body was as much a search as his opening the trunk of the vehicle.[6]

The judgment of the district court is affirmed.

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[6] On this appeal the respondent cites two cases which he considers analogous to the police actions here. Both cases involve the police obtaining a vehicle's serial number by opening the door of a car already properly in police custody. In both cases the police acted without a warrant.

In *United States v. Graham*, 391 F.2d 439, 442 (6th Cir. 1968), this Court stated:

> Where police obtain an article for *safekeeping* from a suspect taken into custody pursuant to a lawful arrest, we find no authority which requires them to get a search warrant before *examining the article for the purpose of finding a serial number by which the article might be accurately identified.* [Emphasis added].

This Court went on to hold:

> It is here concluded and held that an examination of an automobile *properly* in police custody is not a search thereof, and that evidence of the *serial number* of such car is not excludable from evidence because it was obtained in the course of such an examination. 391 F.2d at 443 [Emphasis added].

This Court relied on *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967), in *Graham, supra*. In *Cotton* the Ninth Circuit stated:

> They [the police] also had a duty to keep a record of the property that they had impounded so that it could be returned to the suspect or to its owner in due course. For reasons stated below, we do not think that the mere opening of the door of the car for the purpose of making such a record was, under the circumstances, a search, but if it was, the circumstances under which it was done make that search an entirely reasonable one. 371 F.2d at 392.

The court in *Cotton, supra*, also specifically limited its holding, stating:

> When Cotton acquired the car, the serial number and motor number came with it. And we would limit the right to check [the identification number] to those cases in which there is a legitimate reason to do so. 371 F.2d at 393.

See also, United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971); *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970).

We would note that other courts have held that obtaining vehicle serial numbers by opening a car door under similar circumstances is an illegal search. *See, e.g., Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965).

The *Graham* and *Cotton* cases are clearly distinguishable from the instant case. In both cases the vehicles were already properly in police custody — a situation different from the facts before us. Also both *Graham* and *Cotton* were Dyer Act cases and are limited to the situation where the police obtained the *serial* number of cars for identification purposes.

APPENDIX B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 71-76

ARTHUR BEN LEWIS, JR.,
Petitioner,

v.

HAROLD J. CARDWELL, Warden, et al.,
Respondent.

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241(c)(3).

This matter is before the Court on the petition, return of writ, briefs and exhibits of the parties, the bill of exceptions in *State v. Arthur Ben Lewis, Jr.*, No. 3952 (Delaware Cty. C.P. Ct. 1968) and an evidentiary hearing held on April 20, 1972.

On November 8, 1967, the Delaware County Grand Jury returned an indictment charging petitioner with the crime of murder in the first degree. He was tried before a jury on March 4-21, 1968, and found guilty with the recommendation of mercy. On March 29, 1968, he was sentenced to life imprisonment in the Ohio Penitentiary.

Petitioner appealed to the Fifth District Court of Appeals for Delaware County which affirmed the judgment of conviction. He then appealed to the Ohio State Supreme Court which, in *State v. Lewis*, 22 Ohio St. 2d 125

(1970), also affirmed the judgment of conviction.

Petitioner alleges that he is in the custody of respondent in violation of the Constitution of the United States, in that:

1. His arrest was unlawful because it was predicated upon a warrant that had issued under §§2935.09, 2935.10, 2935.17 and 2935.19 of the Ohio Revised Code, which sections are unconstitutional on their face in that they:
   a) fail to provide that a judicial determination be made prior to issuance of a warrant;
   b) fail to provide that facts be set forth in the affidavit that would permit an impartial judicial determination as to the existence of probable cause for issuance of the arrest warrant;
   c) fail to require the officer to state his source, or to aver that such source had previously been reliable.

   The subsequent eliciting of the petitioner's statements and the seizure of his automobile incident to the arrest when entered as evidence in the trial of this cause served as a basis for his conviction, contravening the petitioner's rights under the Fourth and Fourteenth Amendments.
2. His interrogation and subsequent arrest and seizure of his automobile by a vigilante committee (Division of Criminal Activities — ostensibly at the direction of Deputy Sheriff Lavery) was in violation of his right of Fourteenth Amendment's procedural due process, where such committee, assigned by the Ohio Attorney General, was, in actual point of law, operating without legal authority where the Attorney General had no such statutory appointive powers and the subsequent seizure of evidence as a result of this action by the Attorney General when entered as

evidence during the trial of this matter served as a basis for petitioner's conviction.

3. His Fifth Amendment rights were infringed where the vigilante committee (Division of Criminal Activities) summoned the petitioner to the Office of the Attorney General, initiated an interrogation of the petitioner prior to having given him the warning required by Miranda, and that when the purported warning was given, he was not apprised of certain facts, i.e., that anything said can and will be used against him in court, or that an arrest warrant had been issued for his arrest, or that his conversation, prior to the warning as well as after, was being monitored by a hidden electronic eavesdropping apparatus thereby denying the petitioner his Sixth Amendment right to counsel during a critical stage of the proceedings, and the surreptitiously acquired statement when entered as evidence in the trial of the cause served as a basis of his conviction.
4. He was deprived of a fair trial where after the trial court overruled State's Exhibit 111, the trial court erred in permitting the State to present into evidence the hearsay contents of the exhibit in toto, by means of a witness for the State reciting verbatim therefrom; such testimony serving as a basis for conviction and violation of petitioner's rights under the Sixth and Fourteenth Amendments.
5. The warrantless seizure of his automobile, parked on a private lot one-half block from site of his arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's case), further, the automobile was not seized contemporaneous in time and place with petitioner's ar-

rest, and evidence seized therefrom served as a basis of his conviction.

6. He was deprived of any chance he may have had for a fair trial where a woman, whom the State alleged, by pre-trial press releases, was his 'second wife', was issued a subpoena by the State in such flamboyant manner as to maximize newspaper, radio and television coverage and, where, this 'witness' was never called to testify; and where the State with manifest intent, branded petitioner as a 'beast' in the eyes of the jurors, by parading her through the courtroom after the jury was seated, and kept her within the eyesight of the jury by the seating arrangement provided by the State of Ohio; hence, the misconduct by the Office of the Prosecuting Attorney in perpetuating the prejudicial publicity which was crucial to, and denied the petitioner's right to a fair trial and served as a basis of his conviction by denying him the right of due process under the Fourteenth Amendment.
7. Hearsay evidence of the most flagrant kind was adverted to with the manifest intent of depriving him of his right to a fair trial where the contents of an unrelated telephone call was admitted under the trial court's misinterpretation of the hearsay rule and constituted a deprivation of petitioner's right of confrontation and cross examination under the Sixth Amendment.
8. His right to a fair and impartial trial by a jury free of prejudice was impaired where evidence, known to be incompetent when offered, was wrongfully admitted for consideration of the jury and served as a basis of conviction violating the petitioner's constitutional rights as provided by the Fourteenth Amendment.
9. The trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial

and served as a basis of his conviction, depriving him of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment's right to due process.

10. The trial court's denial of his Motion for a New Trial based upon newly discovered evidence was a flagrant abuse of the discretion lodged in that court and served to perpetuate petitioner's imprisonment for a crime of which he is innocent, denying him due process under the Fourteenth Amendment.

Each of the claims for relief will be considered below.

First, the Court will summarize the relevant facts underlying the judgment of conviction as they appear in the bill of exceptions in *State v. Arthur Ben Lewis, Jr.*, No. 3952 (Delaware Cty. C.P. Ct. 1968) and as found by this Court after the evidentiary hearing.

On July 19, 1967 at approximately 2:35 p.m., the body of Paul Radcliffe was found in the brush along the bank of the Olentangy River near the old Tilton building in Delaware County, Ohio. Radcliffe had been killed by multiple pellet wounds of the chest, right arm and right hip.

Delaware County Deputy Sheriffs arrived on the scene shortly after the discovery of the body. They, together with employees of the Bureau of Criminal Investigation and Identification (BCI), investigated the murder scene. Radcliffe's automobile, a 1963 Oldsmobile, was found over the bank of the Olentangy River in the brush near the victim. No weapon was found.

The investigators made casts of tire tracks found at the scene.[1] They also removed foreign paint scrapings

[1] Cast #1 was of a Starfire Imperial tire made by the Cooper Tire & Rubber Co. Cast #2 was of a safety model low profile tire made by U. S. Royal.

from the right rear bumper and fender of Radcliffe's car.

Delaware County Sheriff Eugene Jackson requested the assistance of the Division of Criminal Activities of the Office of the Attorney General of Ohio to investigate the murder. In the succeeding months, the investigation was conducted by Delaware County Deputy Sheriff William Lavery and Chief Investigator Clyde Mann of the Division of Criminal Activities.

Early in the investigation it was learned that in May of 1967 a Columbus businessman, Jack Smith, had become interested in purchasing a business owned by petitioner, Graham's Auto Specialists. They had entered into a contract of purchase at $30,000.00 with a closing date of July 22, 1967. Smith employed Paul Radcliffe, an accountant, to look at petitioner's books for Graham's Auto Specialists.

On July 24, 1967, Deputy Lavery talked with petitioner at Graham's Auto Specialists. Lavery testified at the evidentiary hearing that he considered petitioner a suspect from that time forward.

Mann and Lavery talked with petitioner again on September 28, 1967. At this time the investigation had focused in on petitioner as the prime suspect. Mann called petitioner on October 9, 1967 and requested that he come to the offices of the Division of Criminal Activities at 40 S. 3rd Street, Columbus, Ohio for additional questioning.

On the morning of October 10, 1967 at approximately 8:00 a.m., Deputy Lavery appeared before Delaware County Municipal Judge Thomas C. Clark and filed the following affidavit in support of an arrest warrant:

> Before me, a Notary Public, personally came William B. Lavery, Deputy Sheriff, who, being duly sworn according to law, deposes and says, that one

> Arthur Ben Lewis, Jr., on or about the 19th day of July, 1967, at or about the hour of nine o'clock, A.M., within the State of Ohio, County of Delaware aforesaid and in the Township of Liberty unlawfully then and there did purposely, and of premeditated malice, kill Paul L. Radcliffe, then and there being a human being contrary to Section 2901.01 of the Revised Code in such case made and provided, and against the peace and dignity of the State of Ohio.

Judge Clark issued an arrest warrant for petitioner. The only sworn facts before the Municipal Judge were contained in the affidavit.

At the time he procured the arrest warrant, Lavery had knowledge of the following facts establishing probable cause to believe that petitioner murdered Paul Radcliffe on July 19, 1967 in violation of §2901.01, Ohio Revised Code:

1. Ruth Burns and Alice Stone, residents of the area surrounding the murder site, heard gun shots between 8:00 a.m. and 8:30 a.m. on July 19, 1967.
2. After hearing the gun shots, Ruth Burns heard tires spinning on gravel and the sound of dry wood crackling. She then observed a tan GM product with a black top traveling toward Columbus on Route 315, which passes in front of her house. The automobile was similar in design to her 1966 Corvair.
3. Petitioner owned a beige or gold colored 1966 Pontiac.
4. Gold or beige colored paint was found on the rear bumper and fender of Radcliffe's 1963 Chevrolet.
5. It was Lavery's opinion from observing the murder scene that a vehicle had pushed Radcliffe's automobile over the Olentangy River embankment.

6. The Federal Bureau of Investigation laboratory reported that the paint found on the rear bumper and fender of Radcliffe's automobile was from a 1965 or 1966 GM product.
7. Mrs. Jack Smith received a telephone call between 9:00 a.m. and 9:30 a.m. on July 19, 1967. The caller identified himself as "Radcliffe." He said that the books for Graham's are in "A-1 condition." The caller concluded by saying that he was leaving town and wouldn't be back until Tuesday, July 25, 1967. Mrs. Smith, who had known the victim, said the caller was not Paul Radcliffe.
8. Paul Radcliffe could not have made the call because the observations of Ruth Burns and Alice Stone establish the time of death at around 8:30 a.m.
9. Only petitioner benefited by the information contained in the phone call.
10. Petitioner brought his car to the M & R Garage at approximately 12:00-12:30 p.m. on July 19, 1967 to arrange for repairs to damage to the front grille panel, hood, right front fender, left rear quarter panel and door, and left driver's door of his 1966 Pontiac. The repair work was performed July 20, 1967.
11. On the victim's desk calendar the notation "Call Ben Lewis" appeared on the page dated July 19.

At the time he obtained the arrest warrant for petitioner, Lavery believed petitioner's 1966 Pontiac had been used in the commission of the murder and he wanted to seize the automobile.[2] Lavery did not attempt to obtain a search warrant for petitioner's 1966 Pontiac.

Lavery proceeded with the warrant to the Criminal Activities Division's offices at 40 S. 3rd Street, Columbus,

[2] Lavery first considered petitioner a suspect on July 24, 1967 when he saw petitioner's gold colored 1966 Pontiac at Graham's Auto Specialists.

Ohio. Petitioner arrived at the offices sometime after 10:00 a.m. At 10:30 a.m., investigator Mann began questioning petitioner. Petitioner signed a waiver of his right to remain silent and his right to the assistance of counsel at 10:40 a.m. From that time on the interrogation was recorded, without petitioner's knowledge, by a hidden tape recorder.

Although Lavery was present during the interrogation and other events of October 10, 1967, he did not execute the arrest warrant until approximately 5:00 p.m. in the evening. He testified at the evidentiary hearing that it was a "tactically" better "interrogation technique" to question petitioner before advising him that a warrant had been issued for his arrest.

The questioning covered petitioner's activities on the morning of July 19, 1967; the damage to his 1966 Pontiac; his contacts with Radcliffe prior to July 19, 1967; the type of guns he owned; and his financial condition. Several of petitioner's statements were potentially incriminating.[3] Taken as a whole, the statements were consistent with the defense presented at trial.[4]

The interrogation continued until around noon. Between 12:30 p.m. and 1:00 p.m., petitioner was taken to his home by the investigators and Deputy Lavery. There the investigators searched for a shotgun. Nothing was seized. Everyone returned to the offices of the Division of Criminal Activities.

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[3] Petitioner's recounting of how the 1966 Pontiac was damaged varied from that he gave to the repairmen at the M & R Garage when he had the damage repaired. His statements concerning his financial status were relevant to the prosecution's theory that the murder was motivated by his desire to sell Graham's Auto Specialist to extricate himself from financial difficulties.

[4] Throughout the questioning petitioner consistently maintained his innocence. As he did at trial, petitioner told Mann that he took his son to work at a swimming pool and then picked up some auto parts at Dixie International during the time the murder allegedly occurred.

At no time after his arrival at the Criminal Activities Division office around 10:00 a.m. was petitioner permitted to leave these premises. Furthermore, he had to obtain permission to use the telephone.

The questioning continued for a brief period following the return from petitioner's residence. Around 3:30 p.m., petitioner said he wanted to talk with his attorney. He was permitted to call David E. Tingley, who had previously represented him in civil matters. Mr. Tingley called Paul Scott with respect to representing petitioner. Mr. Tingley and Mr. Scott arrived at the offices of the Division of Criminal Activities at approximately 4:00 p.m. Mr. Scott conferred with petitioner. The interrogation did not continue.

Sometime after 5:00 p.m., Deputy Lavery formally executed the arrest warrant, taking custody of petitioner. As they were leaving the offices of the Criminal Activities Division, Lavery obtained possession of the keys to petitioner's 1966 Pontiac which was parked approximately one-fourth of a block away in a private parking lot open to the public. The manner in which Lavery obtained possession of the keys is in dispute.

At the hearing on a motion to suppress the fruits of a search of the automobile, Mann testified that he, Lavery and David Kessler[5] talked the matter over and decided to impound the automobile. Mann recalled telling petitioner, probably prior to the arrival of Mr. Tingley and Mr. Scott, that he was going to impound the automobile because it was used in a felony. Mann testified that after his arrest, petitioner requested that his automobile be

[5] Mr. Kessler was the Asisstant Attorney General of Ohio in charge of the Criminal Activities Division. He later was designated a special Delaware County Prosecutor to assist in the prosecution of petitioner. He presented the State's case at petitioner's trial.

put in a police lot for safekeeping.[6] Mann then seized the automobile under the authority that it was used in the commission of a felony. Lavery's testimony was substantially the same as Mann's.

Mr. Tingley testified at the hearing on the motion to suppress that Mann told Mr. Scott that he wanted petitioner's automobile. Mr. Scott asked, under what authority? Mann replied that it was used in the commission of a felony. Mr. Scott then relinquished the keys, stating he was "not going to enter into a physical fight with [Mann] if [he was] taking custody of the automobile."

At the evidentiary hearing herein Mr. Scott and petitioner testified that around the time of the arrest, i.e., 5:00 p.m., petitioner gave Mr. Scott the keys to the automobile and a claim check for it, requesting Mr. Scott to see that his wife and family got the automobile. After the arrest, Mann demanded a briefcase containing personal papers belonging to petitioner. Mr. Scott refused. Mann also said that he was going to take the automobile. Mr. Scott testified that to avoid becoming involved in a physical confrontation, he gave the keys to Mann, telling him that he would "see [Mann] in court on a motion to suppress."

Mann and Lavery also testified at the evidentiary hearing. Their testimony did not materially differ from that at the hearing on the motion to suppress. Lavery did concede that he probably would have taken the automobile regardless of whether or not petitioner had asked him to take it for safekeeping.

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[6] Mann testified at the hearing on the motion to suppress that petitioner:

> asked me to have his car impounded, or put in a police lot for safekeeping, because the lot that he had it in, which was next door to our office, he didn't want it to sit there overnight, afraid somebody would ransack the car, and take any merchandise that he had in the car. He asked me to impound the car for safekeeping.

The automobile was impounded by the Columbus Police Department. Steve Molnar, Jr., a BCI lab technician, viewed the automobile on October 11, 1967 in the impounding lot. He searched the trunk and found a new Uniroyal tire. He observed that there were two almost new Hercules Safety Cream 855.14 tires on the front of the automobile. He noted that the right rear tire was made by U.S. Royal and could have made one of the cast impressions made at the murder scene. Molnar then took paint scrapings from the right rear and left front of the automobile. He was not acting pursuant to a search warrant.

At trial, Molnar testified that the foreign paint scrapings found on the right rear bumper and fender of Paul Radcliffe's 1963 Oldsmobile were beige painted over a grey primer which, in turn, was over a black primer next to metal. The paint samples taken from petitioner's car on October 11, 1967 were also beige painted over a grey primer, over a black primer next to metal. Molnar testified that it was his expert opinion that there was no difference in the color, texture or order of layering of the paint samples taken from the right rear bumper and fender of Radcliffe's automobile and the right rear and left front of petitioner's automobile.

Additional facts relevant to the decision will be set out below with respect to the specific claims for relief.

I, II, III, AND IV

Petitioner's first four claims for relief were not presented to the Fifth District Court of Appeals for Delaware County, Ohio or to the Ohio Supreme Court.

In *Picard v. Connor*, 404 U.S. 270, 275 (1971), the United States Supreme Court held that a federal claim

for relief must be fairly presented to the state courts before it may be considered by a United States District Court in habeas corpus. See, 28 U.S.C. §2254(b), (c). A state prisoner cannot bypass the state courts. But a petitioner need not pursue state court remedies if there is "an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of prisoners." 28 U.S.C. §2254(b).

Petitioner could have presented these claims for relief to the Ohio courts in his direct appeal. At the evidentiary hearing in this Court, Mr. Scott and petitioner testified that petitioner sought to have the issues presented to the Ohio courts but that Mr. Scott, in his professional judgment, decided against raising them.

Fifty per cent of Mr. Scott's practice is in the area of criminal law. He is a respected and competent trial attorney both in the criminal and civil fields. His decision not to raise the issues in the direct appeal represents his best professional judgment which is within the range of reasonably competent judgment constitutionally mandated. *See, McMann v. Richardson,* 397 U.S. 769, 772-773 (1970).

On the other hand, there is no evidence that petitioner decided to voluntarily forego his right to present these claims to the Ohio courts.[1]

The question remains: is there an available Ohio precedure in which petitioner can raise the first four claims for relief alleged herein. Respondent asserts that petitioner has available the remedy of a delayed appeal from the judgment of conviction to the Fifth District Court of

[1] Whether or not he waived his right to present these claims to the Ohio courts is governed by Ohio law. But, assuming these claims for relief raise constitutional questions, petitioner's conduct did not amount to "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). He sought to have the claims presented to the Ohio courts.

Appeals under the provisions of §2953.05, Ohio Revised Code. Alternatively, respondent contends petitioner has available the remedy of a petition to vacate sentence under the provisions of §2953.21, *et seq.*, Ohio Revised Code.

A prisoner is not required to undertake a futile exhaustion of State remedies. *See, e.g., Terry v. Wingo,* 454 F.2d 694 (6th Cir. 1972); *Woodards v. Cardwell,* 430 F.2d 978 (6th Cir. 1970); *cert. denied,* 401 U.S. 911 (1971); *Allen v. Perini,* 424 F.2d 134 (6th Cir. 1970), *cert. denied,* 400 U.S. 906 (1970); *Lucas v. Michigan,* 420 F.2d 259, 261 (6th Cir. 1970); *Duke v. Wingo,* 386 F.2d 304, 306 (6th Cir. 1967), *cert. denied,* 397 U.S. 1013 (1970).

Presenting the claims for relief in a post-conviction petition would be futile. In *State v. Duling,* 21 Ohio St. 2d 13 (1970), the Ohio Supreme Court held that constitutional claims could not be considered in proceedings under §2953.21, *et seq.*, Ohio Revised Code if they have already been *or could have been* fully litigated on direct appeal. The first four claims for relief herein could have been raised on direct appeal, therefore post-conviction relief is unavailable.[8]

The Court now turns to the question of the availability of a delayed appeal. The general rule is that an Ohio prisoner who was convicted after trial is required to raise his claims for relief in a direct or delayed appeal under the provisions of §2953.05, Ohio Revised Code to exhaust his available state court remedies as required by 28 U.S.C. §2254(b), (c). *See, Mackey v. Koloski,* 413 F.2d

[8] In the instant case, petitioner and his counsel knew the issues could have been raised on direct appeal. In *Duling,* the constitutional claim had not yet been recognized by the courts at the time of direct appeal and was consequently unknown to the prisoner and his attorney at the time of appeal. Yet, the Ohio Supreme Court held that the unrecognized constitutional claim "could" have been raised on direct appeal. The prisoner was barred from raising the claim in post-conviction proceedings.

1019 (6th Cir. 1969). Section 2953.05, Ohio Revised Code provides, in relevant part:

> Appeal . . . may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial. . . . After the expiration of the thirty day period . . . such appeal may be taken only by leave of the court to which the appeal is taken.

Ohio courts have uniformly held that a defendant must show good cause why he did not file a direct appeal to be granted leave to file a delayed appeal. *State v. McGahan*, 86 Ohio App. 283, 284 (Franklin Cty. Ct. Apps. 1949); *Ex parte Hertz*, 74 Ohio L. Abs. 71 (Franklin Cty. Ct. Apps. 1953). *See, State v. Sims*, 27 Ohio St. 2d 79 (1971); *Toledo v. Reasonover*, 115 Ohio App. 434 (Lucas Cty. Ct. Apps. 1962); *State v. Steele*, 30 Ohio Ops. 2d 41, 42 (Ross Cty. Ct. Apps. 1964).

This Court can find no reported case deciding whether a delayed appeal lies to raise issues which were not raised on direct appeal.

This Court believes that §2953.05, Ohio Revised Code should be construed liberally in favor of granting a remedial process through which constitutional questions may be raised. *See, Case v. Nebraska*, 391 U.S. 336 (1965).

The existing Ohio case law is consistent with this interpretation. Therefore, the Court concludes that if petitioner can show good cause why these issues were not presented on direct appeal, he has available the state court remedy of a delayed appeal. *But cf., Woodards v. Cardwell, supra.*

The Court HOLDS that petitioner has not exhausted his available state court remedies with respect to the first

four claims for relief as required by 28 U.S.C. §2254(b), (c).

V

We reach now the fifth claim for relief. Petitioner contends the warrantless seizure of his 1966 Pontiac, its subsequent search and resultant seizure of paint scrapings and the admission of evidence and testimony relating to analysis of the paint samples was in violation of the Fourth and Fourteenth Amendments.[9]

Respondent argues that the search was justified either on the theory that it was incident to a valid arrest or because the officers had probable cause to believe the car was an instrumentality of a crime. If these arguments fail, respondent alleges that petitioner voluntarily surrendered the keys to the automobile and requested that the officers take the car into custody. Finally, no items were seized from the interior of the car. The exterior of the automobile was in plain view and consequently the paint scrapings were subject to seizure because the officers had probable cause to believe the automobile was used in the commission of a crime.[10]

Petitioner's fifth claim for relief has been raised at every stage of the Ohio proceedings. After the hearing

[9] In addition to taking paint samples, Molnar opened the trunk and observed a Uniroyal tire. He also noted the make of all the tires on the automobile. A photograph was taken of the automobile and introduced into evidence at trial. Petitioner contends the admission of this testimony and evidence also violated the Fourth and Fourteenth Amendments.

[10] Respondent also apparently argues that there was no search and seizure because the only thing seized — paint — was from the exterior of the car. No cases are cited supporting this novel proposition. Admittedly, testimony describing the exterior color of the car would not run afoul the Fourth Amendment if the witness had lawfully been in a position to observe its color. However, the intrusion herein was not limited to an observation of the exterior of the automobile. A search was conducted of the lawers of paint beneath the visible surface of the vehicle.

on the motion to suppress, the Delaware County Common Pleas Court made no detailed findings of fact. The Common Pleas Court made the general finding that "the car was seized, impounded and searched because of the crime for which the defendant was arrested. . . ." Upon consideration of the evidence as a whole the Common Pleas Court concluded:

> It appears to this court that it was reasonable for law enforcement officers to immediately seize a car which their investigation gave them reasonable cause to believe it had been used in the commission of a felony charge. The car was in the possession or constructive possession of the defendant; he had the keys and parking ticket for it. It was on a public parking lot adjacent to the building which public state offices are located and where the defendant had just been arrested.
>
> This is not a case in which a person's home or private structure has been unreasonably invaded. This is not a case in which an individual's person has been unreasonably searched.
>
> In this court's opinion the seizure of this car was incident to a lawful arrest. In this court's opinion subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the defendant was arrested.

The Fifth District Court of Appeals for Delaware County on consideration of petitioner's appeal held:

> Defendant-appellant sets forth ten assignments of error. We have carefully examined the record, assignments of error, bill of exceptions, heard the oral arguments of counsel, and find no error prejudicial to the defendant-appellant.

The Ohio Supreme Court found that petitioner's automobile was used as an instrumentality of a crime:

> In the instant case, the investigating authorities had reasonable grounds to believe that the car had been used in the furtherance of the commission of the crime; that because it was used to push the victim's car over the river embankment, it was an instrumentality of the crime. Therefore, two samples were taken from the exterior of the car to compare the paint found on decedent's car.

The Ohio Supreme Court then held:

> that the examination by the police of an automobile which is an instrumentality of a crime, for evidence in connection with the crime in which the automobile was used, is not an unlawful search and seizure even though the examination is conducted at a time and place remote from the time and place of the arrest of the owner and seizure of the automobile.
>
> Since the seized car was an instrumentality used in the crime, the authorities had as much right to examine it as they would to examine a weapon claimed to have been used in the commission of a crime.

Each of the above courts was presented with the argument that petitioner had consented to the search by voluntarily relinquishing the keys to the officers. The consent rationale was not adopted by any Ohio court. However, respondent again asserts that petitioner's "consent" to police officers taking custody of the automobile is a factor which contributes to the lawfulness of the search and seizure of the automobile.

The following general rules govern the determination of whether a defendant has given his consent to a search:

1. The government has the burden of proving consent was given. *Bumpers v. North Carolina*, 391 U.S. 543, 548 (1968); *Rosenthall v. Henderson*, 389

F.2d 514, 515-516 (6th Cir. 1968); *Simmons v. Bomar*, 349 F.2d 365 (6th Cir. 1965); *Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931); *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951); *Watson v. United States*, 249 F.2d 106, 108 (D.C. Cir. 1957); *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962); *United States v. Page*, 302 F.2d 81, 83 (9th Cir. 1962); *State v. McCarthy*, 20 Ohio App. 2d 275, 284-285 (Cuyahoga Cty. Ct. Apps. 1969).

2. The prosecution must demonstrate that the consent is uncontaminated by any duress or coercion, either express or implied. *Simmons v. Bomar, supra*; *Judd v. United States, supra*; *United States v. Page, supra; Watson v. United States, supra.*
3. The consent must be "unequivocal, specific and intelligently given." *Simmons v. Bomar, supra*; *Kovach v. United States, supra*; *Judd v. United States, supra*; *United States v. Page, supra*; *Villano v. United States, supra.*
4. If the defendant was in custody, there must be clear and positive testimony that he voluntarily consented to the search. *Catalanotte v. United States*, 208 F.2d (6th Cir. 1963); *Judd v. United States, supra; United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied* 372 U.S. 906 (1963); *United States v. Page*; *see also, Hubbard v. Tinsley*, 350 F.2d 397, 398 (10th Cir. 1965).
5. Courts indulge every reasonable presumption against the waiver of fundamental constitutional rights. *United States v. Page, supra*; *Weed v. United States*, 340 F.2d 827, 829 (10th Cir. 1965); *see generally, Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).
6. Consent to search is not lightly to be inferred. *Simmons v. Romar, supra*; *Rosenthall v. Hender-*

son, supra; *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965).

7. Whether consent was given is an issue of fact which must be determined by the United States District Court in a habeas corpus action where there is no state court finding of fact which complies with the requirements of 28 U.S.C. §2254(d). *Rosenthall v. Henderson, supra.*

Cases collected in ANNO: VALIDITY OF CONSENT TO SEARCH GIVEN BY ONE IN CUSTODY OF OFFICERS, 9 ALR 3d 858 (1966 and 1971 Supp.) indicate that if a defendant who has been stopped in an automobile either gives the keys to the automobile to officers for the express purpose of facilitating a search of the automobile, *McDonald v. United States*, 307 F.2d 272 (10th Cir. 1962); *Grice v. United States*, 146 F.2d 849 (4th Cir. 1945); *Robinson v. United States*, 325 F.2d 880 (5th Cir. 1964); *United States ex rel Anderson v. Rundle*, 274 F.Supp. 364 (E.D. Pa. 1967), or tells the officers to go ahead and search the automobile because he has nothing to hide, *Hughes v. United States*, 377 F.2d 515 (9th Cir. 1967); *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967); *United States v. Bonano*, 390 F.2d 647 (3d Cir. 1968) the consent to search is valid. But, when police officers announce that they are going to seize the automobile and the defendant then hands over the keys to it, the consent is invalid. *Weed v. United States, supra*; *also see, United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966); *United States v. Barton, supra.*

Viewing the evidence in the light most favorable to the State, petitioner did not clearly and unequivocally consent to the seizure and search of the automobile. The testimony of Deputy Lavery and investigator Mann established, at most, that petitioner consented to their taking

of the car for safekeeping. There is no evidence
titioner consented, expressly or impliedly, to a
of the automobile for purposes of a search. All
vidence demonstrates petitioner desired that the
bile be maintained in a safe condition for the
liate or ultimate) use of his wife and family.[11]
fact, the arresting officers asserted that they were
the automobile on a different ground—that it was
umentality used in the commission of a felony. By
ce, they rejected petitioner's alleged "consent"
it was too limited.

Court further finds the defendant's counsel, Mr.
who is experienced in the practice of criminal law,
rything within his ability to protect petitioner's
Amendment rights.

r the circumstances of this case, the Court
S that petitioner did not consent to the seizure and
uent search of his automobile.

Court now turns to the two main justifications as-
for the warrantless search and seizure of peti-
automobile: (1) it was seized incident to peti-
arrest, and (2) it was seized as an instrumentality
murder in plain view of the officers.

olidge v. New Hampshire, 403 U.S. 443, 454-55
, Mr. Justice Stewart succinctly stated the govern-
nciple of search and seizure:

Searches conducted outside the judicial process,
thout prior approval by judge or magistrate, are
r se unreasonable under the Fourth Amendment—

State implies, but does not support by decisional law, that automobile was in police custody they could do with it what uld. This view was rejected in *Coolidge v. New Hampshire*, 443, 468, 471 (1971). Assuming the automobile was lawfully custody for safekeeping, the State was not justified in taking apings from the vehicle. Such an intrusion is not a normal sary result of impounding a vehicle. *Cf., Harris v. United* 90 U.S. 234, 236 (1968).

subject only to a few specifically established and well-delineated exceptions." [5] The exceptions are "jealously and carefully drawn." [6] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made the course imperative." [7] "[T]he burden is on those seeking the exemption to show the need for it." [8]

Thus, this Court starts with the premise that the warrantless search and seizure herein was unconstitutional, and its fruits inadmissible at trial, unless the State can prove that it fell within one of the well-delineated exceptions to the general rule. Each justification asserted will be discussed in turn.

A. *Search Incident to an Arrest.*

In *Chambers v. Maroney*, 399 U.S. 42, 47 (1970), the Supreme Court recognized that a search cannot be justified as incident to an arrest if it is not contemporaneous in time and place to the arrest. *See also, Preston v. United States*, 376 U.S. 364, 367 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). Nonetheless, if the vehicle is seized at the time of arrest and the circumstances of the arrest would have justified a search of the vehicle incident to the arrest, a search of the vehicle conducted at a later time and place is reasonable under the Fourth Amendment. *Chambers v. Maroney, supra at* 52.

The search of petitioner's automobile was not incident to his arrest because it was conducted at a time and place remote from it. The question remains, could the

[5] *Katz v. United States*, 389 U.S. 347, 357.

[6] *Jones v. United States*, 357 U.S. 493, 499.

[7] *McDonald v. United States*, 335 U.S. 451, 456.

[8] *United States v. Jeffers*, 342 U.S. 48, 51.

See also, *Coolidge v. New Hampshire, supra* 403 U.S. at 481, 484; *United States v. Nelson*, No. 71-1155-56 (6th Cir. April 21, 1972) (citing the language from Justice Stewart's opinion at pp. 454-455 approvingly).

State have seized the car incident to the arrest, thus placing the search within the *Chambers* exception.

The rationale permitting warrantless searches incident to an arrest rests upon the conclusion that one or both of the following factors precluded the police from obtaining a search warrant and made it reasonable for the officers to search the automobile rather than obtain a warrant:

a. The circumstances establishing probable cause for search of the vehicle were unknown to the police prior to the defendant's apprehension.

b. The vehicle is mobile, and if officers delay to obtain a search warrant, one of defendant's confederates will remove the automobile and prevent the police from searching for the object or objects subject to seizure.

Carroll v. United States, 367 U.S. 132 (1925); *Chambers v. Maroney, supra*, 399 U.S. *supra* at 50-51.

Cases involving asserted searches of automobiles incident to an arrest fall into four factual categories:

1. Defendant lawfully arrested inside an automobile and the arresting officers had probable cause to believe that contraband or other evidence of a crime was concealed in the automobile.

   Chambers v. Maroney, supra; *Arwine v. Bannan*, 346 F.2d 458 (6th Cir. 1965); *cert. denied* 382 U.S. 882 (1965); *United States v. Dento*, 382 F.2d 361 (3d Cir. 1967), *cert. denied* 389 U.S. 944, *rehearing denied* 389 U.S. 997 (1967).

2. Defendant lawfully arrested at or near the scene of a crime soon after its commission, and the police had probable cause to believe that contraband or other evidence of a crime was concealed in the automobile which was parked at or near the scene of the crime. Other known accomplices are still at large.

United States v. Mazzochi, 424 F.2d 49 (2d Cir. 1970); *Moodyes v. United States*, 400 F.2d 360 (8th Cir. 1968), *cert. denied* 397 U.S. 998 (1970); *Cf. United States v. Roth*, 430 F.2d 1137 (2d Cir. 1970), *cert. denied* 400 U.S. 1021 (1970); *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert. denied* 386 U.S. 964 (1967).

3. Defendant arrested lawfully some time after the commission of the offense (usually a day or more) and at a place removed from the vehicle searched. Police had probable cause to believe that contraband or other evidence was concealed in the automobile.

   United States v. Marti, 421 F.2d 1263 (2d Cir. 1970); *Staples v. United States*, 320 F.2d 817 (5th Cir. 1963); *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960); *Williams v. United States*, 323 F.2d 90 (10th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964); *Derby v. Cupp*, 302 F.Supp. 686 (D. Ore. 1969); *United States v. Barton*, 282 F.Supp. 785 (D. Mass. 1967); *Conti v. Morgenthau*, 232 F.Supp. 1004 (S.D. N.Y. 1964); *Lucas v. Mayo*, 222 F.Supp. 513 (S.D. Tex. 1964); *Commonwealth v. Togo*, 248 N.E. 2d 285 (Mass. S. Ct. 1969). *But see, Drummond v. United States*, 350 F.2d 983 (8th Cir. 1965), *cert. denied* 384 U.S. 944 (1966); *McCoy v. Cupp*, 298 F.Supp. 329 (D. Ore. 1969); *United States v. Francolino*, 367 F.2d 1013 (2d Cir. 1966), *cert. denied* 386 U.S. 960 (1967); *Browning v. United States*, 366 F.2d 420 (9th Cir. 1966).

4. Defendant arrested without probable cause and his automobile searched.

   Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

Searches made in the first two categories have been held to be reasonable under the Fourth Amendment. Cases falling within the fourth category are clearly unconstitutional because the searches were made without probable cause. Searches in the third category have generally been held invalid.

The United States Supreme Court recently considered a factual pattern falling within the third category in *Coolidge v. New Hampshire*, 403 U.S. 443 (1970). The facts in *Coolidge* are substantially identical to those in the instant case. Coolidge was the prime suspect in a murder investigation. Police talked with him on several occasions. Eventually, they obtained an arrest warrant for Coolidge and a search warrant for his automobile. The warrants were invalid, but the officers did have probable cause to arrest Coolidge without a warrant. Coolidge was arrested in his home pursuant to an invalid warrant and his automobile, which was parked outside his home in the driveway, was seized under the invalid warrant. The Supreme Court held that under its decisions prior to *Chimel v. California*, 395 U.S. 752 (1969), which substantially restricted the scope of searches incident to an arrest, the seizure of the car the night of Coolidge's arrest and its search several days later was not incident to an arrest.

Assuming that the arrest herein was lawful,[12] the search of petitioner's car was not incident to the arrest

[12] The affidavit in support of the arrest warrant merely recited the statutory elements of first degree murder. It contained *no facts* from which a magistrate could conclude that there was probable cause to believe petitioner had committed the crime. The affidavit was insufficient to support the issuance of the warrant. *Whiteley v. Warden*, 401 U.S. 560 (1971); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Rugendorf v. United States*, 376 U.S. 528 (1964); *Jones v. United States*, 362 U.S. 257 (1960); *Giordenello v. United States*, 357 U.S. 480 (1958).

But the facts known to the arresting officer, see pp. 6-7, *supra*, were sufficient to establish probable cause for the arrest.

within the exception created by *Chambers*. The automobile was not in petitioner's immediate possession or control at the time of the arrest. *Cf. United States v. Rabinowitz*, 339 U.S. 56 (1950).

Neither of the two reasons advanced to justify searches incident to an arrest were existent. See pp. 22-23, *supra*. The first condition was not met because the reasons establishing probable cause to search the automobile were known to officers days, if not weeks, prior to its seizure and subsequent search. The second condition was not met because the officers knew the whereabouts of the car prior to its search and seizure. They could have obtained a warrant at any time, including the morning of October 10, 1967 or any time following petitioner's arrest. There was no danger a confederate would remove the vehicle and destroy evidence. The murder occurred July 19, 1967. Petitioner was first interviewed July 24, 1967. He was again interviewed on September 28, 1967. He knew that he was a prime suspect when he was requested to meet with investigators on October 10, 1967. Petitioner had already been afforded ample opportunity to destroy evidence. If there were any further danger that a confederate would destroy evidence following petitioner's arrest, the State had ample opportunity to obtain a search warrant and eliminate the risk.

The Court HOLDS that the search of petitioner's automobile was not incident to his arrest and did not fall within the *Chambers* exception to the prohibition against unwarranted searches. *See, Coolidge v. New Hampshire*, 403 U.S. *supra*, at 455-457, 473-484; *Cook v. Johnson*, No. 71-1997 (6th Cir. April 18, 1972).

B. *Instrumentality.*

The Ohio Supreme Court held that the automobile was subject to seizure as an instrumentality of the mur-

der which was in plain view. See p. 17, *supra*. This theory was also rejected by the United States Supreme Court in *Coolidge*.

The instrumentality theory assumes that any object used in the commission of a crime may be seized *at any time* without a warrant as long as the officers have probable cause to believe that the object was used in the commission of a crime and the officers are lawfully in a position to view the object.[13] See, *State v. Lewis*, 22 Ohio St. *supra* at 128-130 and the cases cited therein.

In rejecting this theory, the United States Supreme Court held that all warrantless searches are *per se* unreasonable absent "exigent circumstances" and that when police plan to seize an automobile prior to the time of arrest but fail to obtain a valid warrant, the search violates the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. *supra* at 478, 481. The police cannot seize an automobile on the theory that it is an instrumentality of a crime which is in plain view in calculated disregard for the Fourth Amendment requirement that application be made to a judicial officer for a search warrant absent exigent circumstances.[14]

The Court HOLDS that the seizure and subsequent search of petitioner's automobile cannot be justified on

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[13] In *Coolidge*, the Supreme Court recognized that such a seizure would be justified if the object came into view inadvertently while officers were in hot pursuit of a suspect, *Warden v. Hayden*, 387 U.S. 294 (1967), incident to a lawful arrest, *Chimel v. California*, 395 U.S. 752, 762-763 (1969), or on an occasion unconnected with an arrest or search when an officer inadvertently observes an incriminating object, *Harris v. United States*, 390 U.S. 234 (1968). *Coolidge v. United States*, 403 U.S. *supra* at 465-466.

[14] Respondent's contention that officers were lawfully in the presence of the automobile to view its exterior because petitioner "consented" to their taking custody of it is irrelevant to a determination of this issue. Assuming officers were legally in position to view the automobile, they could not claim "exigent circumstances" when they had intended to search the automobile for some time prior to the arrest, yet failed to obtain, or even attempt to obtain, a search warrant.

the grounds that it was seized in plain view as an instrumentality of the murder. *Coolidge v. New Hampshire*, 403 U.S. *supra*, at 464-473, 478, 481, 484; *Cook v. Johnson*, *supra*.

There were no exigent circumstances permitting the warrantless search of petitioner's automobile. Therefore, the Court HOLDS that the fruits of the search should have been excluded from evidence at trial and were erroneously admitted into evidence in violation of the Fourth and Fourteenth Amendments.

The error requires the issuance of the writ of habeas corpus, because the Court cannot declare that the admission into evidence of the paint scrapings was harmless beyond a reasonable doubt.[15] *Chapman v. California*, 386 U.S. 18, 21-24 (1967).

Petitioner's conviction rested entirely upon circumstantial evidence. The laboratory analysis of the paint scrapings taken from petitioner's car and the expert's opinion that there was no difference in color, texture or order of layering of the paint from petitioner's automobile and the foreign paint found on the victim's automobile was an important link in the prosecution's case. The evidence was offered to prove that petitioner was at the murder scene and had used his automobile to push the victim's automobile over the embankment.

Under these circumstances, the Court cannot say that the evidence did not contribute to petitioner's conviction.

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[15] The only evidence seized was the paint scrapings from the right rear and left front of the automobile. Steve Molnar, Jr., the BCI lab technician who seized the paint from the automobile also opened the trunk. At trial he testified that he observed a new Uniroyal tire. It was not seized. This testimony was not critical to the State's case. It was merely cumulative. The clerk who sold the two Hercules Safety Cream 855.14 tires found on the front of petitioner's 1966 Pontiac and the mechanic who put them on and took off two almost new Uniroyal tires and placed them in the trunk both testified at trial.

Chapman v. California, supra; *Rosenthall v. Henderson*, 389 F.2d *supra* at 516.

Therefore, the Court HOLDS that petitioner's fifth claim for relief is MERITORIOUS.

VI

Petitioner alleges that the State denied him his right to a fair trial when the prosecutor issued a news release announcing that the prosecution had subpoenaed Mrs. Betty Cummins Lewis, petitioner's "other wife," as a witness, but subsequently did not call her as a witness.

The evidence at the evidentiary hearing was that newspaper articles did appear the week before the trial stating that the State's first subpoena was issued for Mrs. Betty Cummins Lewis. Later, the issuance of other subpoenas were not announced individually.

The State intended to call Betty Cummins Lewis to prove petitioner's indebtedness. During the trial, the trial court admonished the prosecutor to avoid getting into the alleged relationship between Mrs. Betty Cummins Lewis and petitioner if she was called to the stand. The State announced to the court its intention to call her, but after a recess decided that it had already presented sufficient evidence of petitioner's indebtedness and did not, in fact, call her as a witness.

The Court has carefully reviewed the evidence offered by petitioner to prove this allegation and concludes that there was not such a probability of prejudice from the pretrial publicity as to prevent a fair and impartial trial by jury. *See, Estes v. Texas*, 381 U.S. 532, 542-543 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Further, there is no evidence that the State knowingly engaged in tactics calculated to deprive the petitioner of his right to a fair trial. *See, Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Chambers v. Florida*,

309 U.S. 227 (1940); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, —— U.S. —— (1972).

Therefore, the Court HOLDS that the sixth claim for relief is without merit, and therefore it is DENIED.

VII

Petitioner objects to the admission into evidence of the hearsay testimony of Mrs. Jack Smith that she received a call from a person who identified himself as "Radcliffe."[16] In *State v. Lewis*, 22 Ohio St. 2d 125, 131-134 (1970), the Ohio Supreme Court held that the testimony was admissible under Ohio law to establish the fact that the phone call was made but not to establish the truth of the caller's statements. The testimony was admitted at trial for that permissible purpose.

The Confrontation Clause does not constitutionalize the rules governing the admission of hearsay evidence. Each State may establish its own rules of evidence. The Confrontation Clause is not a mechanism by which federal courts propound state court rules of evidence. *Dutton v. Evans*, 400 U.S. 74, 80, 86 (1970), *Cf. Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). A United States District Court does not sit as a court of appeals to review allegations of state trial court error. *See, Reese v. Cardwell*, 410 F.2d 1125 (6th Cir. 1969).

There was no violation of the Confrontation Clause. Mrs. Smith testified under oath and was available for cross-examination. The jury had an opportunity to view

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[16] At trial, Mrs. Smith testified that she had received a telephone call between 9:00 a.m. and 9:30 a.m. on July 19, 1967 from a person who identified himself as "Radcliffe" or "Mr. Radcliffe." She testified, over objection, that the caller said: "I went over the books last night and this morning. Everything is in A-1 shape [or condition]. I am going out of town, and I won't be back until Tuesday." Mrs. Smith testified that the caller was not Paul Radcliffe.

her demeanor and judge her credibility. This is all the confrontation clause requires under the circumstances. *California v. Green*, 399 U.S. 149, 158-159 (1970). The truth or falsity of the extra judicial declarant's statement that he had examined the books, found them in A-1 condition, and was going out of town was not at issue. Therefore, petitioner was not deprived of his right to cross-examine the caller.

The Court HOLDS that petitioner's seventh claim for relief is without merit.

VIII. IX

Petitioner's eighth claim for relief is an allegation that the trial court erroneously admitted incompetent and irrelevant testimony into evidence. His ninth claim for relief is that the trial court erred in arbitrarily limiting defense counsel in the scope of his direct examination of a defense witness. Both of these claims for relief are allegations of State trial court error.

Errors in the admission of evidence committed by a state trial court, which do not violate any specific constitutional guarantee, are not cognizable in habeas corpus. *See, Reese v. Cardwell, supra*; *Schalf v. Bennet*, 408 F.2d 325 (8th Cir. 1969), *cert. denied*, 396 U.S. 887 (1969); *Crisafi v. Oliver*, 396 F.2d 293 (1968), *cert. denied*, 393 U.S. 889 (1968); *Durham v. Haynes*, 368 F.2d 989 (8th Cir. 1968); *Trujillou v. Tinsley*, 333 F.2d 185 (10th Cir. 1964), *see also, Ballard v. Howard*, 403 F.2d 653 (6th Cir. 1968); *Fernandez v. Klinger*, 346 F.2d 210 (9th Cir. 1965), *cert. denied*, 382 U.S. 895 (1965); *Edmondson v. Warden*, 355 F.2d 608 (4th Cir. 1964).

The errors alleged in the eighth and ninth claims for relief are of State law and they do not amount to a deprivation of a specific constitutional right.

Therefore, the Court HOLDS that the claims for relief numbered eight and nine are without merit, and therefore they are DENIED.

X

Petitioner's final claim for relief is that newly discovered evidence entitled him to a new trial.

This claim is a matter of State law and was fully and fairly considered by the Ohio Supreme Court.

There is a suggestion in petitioner's brief that law enforcement officers or the prosecution may have suppressed the potentially exculpatory evidence. *See, Brady v. Maryland, supra*; *Giglio v. United States, supra.*

The evidence adduced at the evidentiary hearing is as follows. In May, 1967, Paul Radcliffe told Harrison S. Berlin, a client, that he had been threatened by a man with a shotgun. Mr. Radcliffe gave no details of the threat. He did not say where or when the threat occurred. Shortly after the murder, Mr. Berlin called the Franklin County Sheriff's Office and reported his earlier conversation with Mr. Radcliffe. Det. Samuel Powers of the Franklin County Sheriff's Office received the report of the threat. He did not consider it important because neither the time nor place of the incident was known. He did tell Deputy Lavery about the report, although he could not recall whether he ever knew Mr. Berlin's first name.

On July 25, 1967, an article appeared in the Columbus *Dispatch* reporting the May threat incident in detail. Jay Gibian, the newsman who wrote the article, testified at the evidentiary hearing that he had been told of the threat by Deputy Lavery and Det. Powers. Mr. Gibian never knew the name of the person who made the report of the threat to the Franklin County Sheriff's Office.

Before trial, Paul Scott talked with Deputy Lavery about the reported May threat on Radcliffe's life. Deputy Lavery told Mr. Scott that the report of the threat was made by a person named Berlin. Lavery may have said "Roger Berlin." Mr. Scott testified that he didn't believe Deputy Lavery had attempted to mislead him.

The defense subpoenaed Roger Berlin at trial because he would not talk to Mr. Scott prior to trial. Roger Berlin was called as a witness but gave no testimony relevant to the case. Mr. Scott then learned that Roger Berlin had a brother, Harrison. The defense did not subpoena Harrison Berlin.

The Court finds that there was no deliberate misrepresentation regarding the identity of Harrison Berlin as the person who reported a May, 1967 threat on Paul Radcliffe's life to the Franklin County Sheriff's Office. Therefore, the Court concludes that petitioner was not deprived of any right under the Constitution of the United States.

The Court HOLDS that petitioner's tenth claim for relief is without merit.

WHEREUPON, the Court HOLDS that the petition is without merit with respect to the claims for relief numbered 1-4, 6-10, and therefore it is DENIED with respect to these claims. The Court FURTHER HOLDS that the petition is meritorius with respect to the fifth claim for relief, and therefore it is GRANTED with respect to that claim.

Accordingly, it is ORDERED that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioner be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials

initiate action for a new trial, it is ORDERED that no writ of habeas corpus shall issue.

/s/ JOSEPH P. KINNEARY
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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PETITIONER'S BRIEF

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit entitled *Arthur Ben Lewis* v *Harold J. Cardwell, Warden,* No. 72-1679, is set forth as Appendix A to the Petition for Writ of Certiorari at page 27 thereof.

The prior opinion of the United States District Court for the Southern District of Ohio, Eastern Division entitled *Arthur Ben Lewis, Jr.* v *Harold J. Cardwell, Warden,* Civil Action 71-76, is set forth as Appendix B to the Petition for Writ of Certiorari at page 35 thereof.

Jurisdiction

The opinion of the United States Court of Appeals was filed on April 5, 1973. The Petition for Writ of Certiorari was filed in typewritten form on June 1, 1973 and in printed form on or about November 3, 1973 and Certi-

orari was granted December 3, 1973. The jurisdiction of this Court derives from 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether, after a state trial court judge has, following a full *voir dire* hearing, found the objected to evidence to have been legally seized, which finding was supported by the record, the United States District Court should ignore this finding and conduct a separate evidentiary hearing.

2. Whether, after an acknowledged valid arrest, respondent voluntarily displayed to the arresting officers a parking lot ticket and the keys to his automobile which they believed to have been used by him in the perpetration of the crime for which he was arrested and these articles were turned over to the arresting officers either voluntarily or involuntarily, a seizure incident to a lawful arrest was consumated.

3. Whether, after a valid seizure of a parking ticket and keys to an automobile which the arresting officers had good reason to believe had been used in the commission of a crime for which respondent was arrested, which automobile was parked at a nearby public parking lot, it was illegal to remove the automobile to the police pound for examination by technical experts.

4. Whether, after an automobile has been seized incident to a lawful arrest, and is in the sole possession of the police, it is necessary to procure a search warrant in order to examine the car for tire and paint comparison.

Constitutional Provisions Involved

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, section 1, in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. History of the Case

On November 8, 1967, the Delaware County Grand Jury returned an indictment charging respondent with murder in the first degree in violation of §2901.01, Ohio Revised Code. He was tried before a jury on March 4-21, 1968, and found guilty with the recommendation of mercy. On March 29, 1968, he was sentenced to a term of life imprisonment in the Ohio Penitentiary.

Prior to trial several defense motions were made and decided. One, a motion to suppress evidence, was heard by the trial court on January 25, 1968 (4A) and overruled in a written opinion and order dated February 20, 1968 (19A). The subject of this motion was the seizure and examination of respondent's automobile.

Respondent appealed his case directly to the Fifth District Court of Appeals for Delaware County, Ohio, which affirmed the judgment of conviction on February 6, 1969. Thereafter, respondent appealed to the Supreme Court of Ohio which affirmed his conviction on May 13, 1970. See *State v. Lewis*, 22 O.S.2d 125.

Respondent then filed a Petition for Writ of Certiorari in this Court. Among those questions presented in that petition was the following:

"Were appellant's rights under the Fourth and Fifth Amendments abridged where appellant's automobile, parked on a private lot one-half block from site of appellant's arrest, was seized and searched without legal process of any kind—even though appellant had been out of the automobile for over eight hours—and where the fruits obtained by such search were received in evidence at appellant's trial in the state court?"

This Court denied the Petition for Writ of Certiorari. See: *Lewis v. Ohio,* 400 U.S. 959 (1970).

In April of 1971, respondent filed a petition for the writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division.

In this petition the following question, among others, was raised:

"The warrantless seizure of his automobile, parked on a private lot one-half block from site of his arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's case), further, the automobile was not seized contemporaneous in time and place with petitioner's arrest, and evidence seized therefrom served as a basis of his conviction." (P. 37, Appendix B to petition)

The only other issue which had been submitted to the Supreme Court of Ohio dealt with the use of hearsay evidence by the State.

Following the filing of a Return of Writ and appointment of counsel, an evidentiary hearing was held on April 20, 1972.

Thereafter, on May 19, 1972, the court issued an Opinion and Order finding nine of the ten issues to be without merit. (Page 35, Appendix B to Petition). However, as to issue five, the court found that respondent had been

denied due process of law and ordered "that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioner be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials initiate action for a new trial, it is ORDERED (sic) that no writ of habeas corpus shall issue."

Petitioner then filed a timely notice of appeal and obtained a stay of execution. Oral argument was heard cuit on December 8, 1972 and on April 5, 1973, the court of appeals issued its decision affirming the opinion of the district court. (Page 27, Appendix A to petition). It is from this judgment of the court of appeals which petitioner seeks this writ of certiorari.

B. Statement of Facts

At the trial of respondent, one Steven Molnar, Jr., a laboratory technician and firearms examiner for the Ohio State Bureau of Criminal Identification and Investigation, testified for the State. He testified that he took paint scrapings from respondent's car while it was at the Columbus police impounding lot. He also said that he had paint scrapings which had been taken from the murder victim's car, which, it was thought, was pushed over the river bank at the scene of the crime, by another car. This examination occurred on October 11, 1967, and the paint was taken from the right rear and the left front of respondent's car, and from the right rear fender and the right side of the rear fender of the victim's car for purposes of comparison. He went on to testify that, in his opinion, there was

> ". . . no difference in color, texture, or order of layering of the paint samples that I was comparing." (Bill of Exceptions, p. 221)

Furthermore, the color of paint was the same.

The paint samples from respondent's car and testimony were admitted over objection.

There was, however, a pre-trial hearing on a motion to suppress filed by respondent. The motion concerned the evidence and testimony referred to above. The hearing was held in the trial court on January 25, 1968. Testifying were Clyde Mann, then Chief Investigator for the Division of Criminal Activities of the Attorney General of Ohio, David Tingley, Attorney at Law, and Sgt. William Lavery, of the Delaware County, Ohio, Sheriff's Office.

Facts adduced at this hearing were as follows:

Respondent was interrogated in the office of the Attorney General, 40 S. Third Street, Columbus, Ohio, on October 10, 1967, pursuant to a request to come to the office. He was served with an arrest warrant and placed under arrest late in the afternoon, after which his car was impounded by the Columbus, Ohio, Police Department.

Mr. Mann testified at the hearing that present during the interrogation of respondent of October 10, 1967, in the Attorney General's Office, were Lavery, Jim Heise, David Kessler, Ed James, respondent and himself. He said that he told respondent, after he was arrested, that he, Mann, was going to impound respondent's car because it was used in a felony, and that he had no warrant. On direct examination, Mr. Mann revealed that respondent asked him to have his car impounded or put in a police lot for safekeeping (10A).

Next to testify was David E. Tingley, Attorney at Law, who testified that he witnessed the facts surrounding the seizure of the automobile. He testified that at about 5:30 p.m. on October 10th, respondent was in custody and

that Clyde Mann indicated to Mr. Scott that he wanted possession of some books and records respondent brought with him as well as the automobile, because it was used in the commission of a felony. Scott then, according to Mr. Tingley, said that he would not enter into a physical fight over the car and gave the keys to Mann. He then got the parking ticket from respondent and gave it to Mann.

Next to testify was Sergeant William Lavery. He stated that he obtained a warrant for respondent's arrest on the morning of October 10, 1967. Furthermore, he stated that he requested Mr. Mann to have the automobile impounded but that, according to his recolletion, respondent had asked the officers to watch the car as he was concerned about it.

The trial court made the following finding:

> "In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was, arrested." (26A).

At the evidentiary hearing of April 20, 1972, in the district court the testimony relative to the seizure and search of the automobile elicited the following: Paul Scott, defense counsel at the trial, testified that respondent gave him the keys to his car shortly before or subsequent to his being arrested, with instructions to return the automobile to his (respondent's) family. He also gave Scott the parking lot claim ticket. Furthermore, after Scott's arrival at the Attorney General's Office and after a conference with respondent, the arrest warrant was served on respondent. After that, according to Scott, Clyde Mann confronted Scott and demanded respondent's briefcase and automobile. Rather than get into a physical

confrontation with Mann, Scott relinquished the keys and the claim check to Mann with the admonition that he would see Mann in court on a motion to suppress.

On cross-examination, Mr. Scott testified that, although there was no real threat from Mann, he did not willfully turn the automobile over to Mann, that it was done under protest, subject to what would happen in a court of law. His exact words were "Well Mr. Mann, I am not going to have a physical confrontation with you for that automobile. Here is the key. Here is the ticket, and I will see you in court on a motion to suppress on that." (49A). ". . . [T]here was no threat." (52A). He acknowledged that he did not give up the briefcase. (52A). Mr. Scott did not question the validity of the arrest (50A). He did not testify at the trial court hearing on the motion to suppress.

Sergeant Lavery testified for the respondent. He stated that, prior to the actual seizure of the car, he did know the description of respondent's car, that on the day of the seizure he had no search warrant, and that respondent asked that his car be taken care of (56A). The Columbus police actually towed the car.

On cross-examination, he stated that he believed the request by respondent that his car be taken care of was made about 5:00, while Mr. Scott was present. He further said that, in his opinion, respondent's request was a general request made of no one in particular. He could recall no discussion between Scott and Mann relative to the car (59A). He also stated that he did not know that respondent's car was parked on the lot south of the Attorney General's Office (62A).

In answer to questions by the district judge, Sergeant Lavery testified:

THE COURT: "You also testified that Mr. Lewis took

the parking lot ticket out of his pocket and asked if either you or Mr. Mann—you weren't sure which—could take care of this automobile since you were going to take him back?"

THE WITNESS: "Yes, sir, that is correct." (60A)

* * * * * * * * *

THE COURT: "Sometime between 4:00 o'clock and the time that the conference terminated, you took Arthur Ben Lewis back to Delaware; that Clyde Mann demanded Mr. Scott that he, Mr. Scott, turn over the keys to Mr. Lewis's car and the ticket to Mr. Lewis's car. Do you recall that Mr. Mann demanded that Mr. Scott turn over the ticket and the keys to Mr .Lewis's car?"

THE WITNESS: "No, sir, that isn't correct at all because I recall precisely Mr. Lewis removing the parking ticket and asking if some one of us would take care of his car. I don't recall the keys." (61A).

Respondent himself was next to testify on the issue of illegal search and seizure at the evidentiary hearing. He testified that he drove to the attorney general's office and parked on a parking lot near that office. He also denied that he asked anyone from the attorney general's office to remove his car saying that he gave his keys and claim check to Paul Scott before he was arrested so that Scott could take the car home for respondent's family's use. Furthermore, he testified that the police officers did have a description of his car (64-65A).

Clyde Mann was the first witness for petitioner to testify relative to the search and seizure issue. He testified again that respondent requested Mr. Mann to take care of his car and claim ticket. Furthermore, this occurred at approximately 5:00 p.m., on October 10, 1967, in the hallway inside the attorney general's office and that, to the best of his knowledge, the claim check was

handed directly to him by respondent. This confrontation apparently occurred close in time to Mr. Mann's request of Scott for possession of respondent's briefcase (73A). Mr. Mann also again testified that he believed the car was used in the commission of the crime and for this reason wanted the car (74A).

Sergeant Lavery was called by petitioner as his witness and testified on direct examination. He testified as to facts he had in his possession on October 10, 1967, relative to respondent's involvement in the crime and the role his automobile played in the commission thereof (76-79A).

Summary of Argument

Arresting officers, in possession of a valid arrest warrant, inadvertently discovered that respondent's automobile, which they sought as evidence in the crime for which he had been arrested, was parked at a nearby public parking lot when respondent produced the parking ticket in their presence and disclosed its location. The police took the parking ticket, recovered the automobile and removed it to the police pound where the following day it was examined. Tire casts were made and paint scrapings were taken for comparison with foreign paint taken from the victim's automobile which had been pushed over a river bank by his murderer.

Prior to trial a motion to suppress the paint sample was made and heard. The trial court, after a *voir dire* hearing, in a well reasoned opinion found that the officers had legally seized the parking ticket incident to the arrest, that this constituted constructive possession of the automobile, and that the subsequent removal and examination of the automobile was made incident to a lawful arrest and upon probable cause.

This finding was clearly supported by the record and

could not be considered to have been erroneous. In addition, the Supreme Court of Ohio, on direct appeal, had found that the record supported the trial court's finding that the car had been seized incident to a lawful arrest and examined as an instrumentality of the crime. *State v. Lewis, supra.* This Court had denied certiorari. *Lewis v. Ohio, supra.* The finding of the Ohio courts should have been accepted by the federal district court in a subsequent habeas corpus action. *La Vallee v. Rose* __ U.S. __, 35 L.Ed. 2d 637 (1973).

In the habeas corpus petition respondent contended that his automobile had been illegally seized and that the paint scrapings and the comparison testimony was improperly admitted in evidence. The district court conducted an evidentiary hearing wherein the evidence elicited did not vary materially from that in the state trial court. One difference, however, did develop. Respondent testified that he gave the parking ticket to his attorney in the presence of the officers with instructions to recover the automobile and deliver it to his family. This was corroborated by the testimony of his trial attorney, Paul Scott. Neither had testified in the trial court hearing on the motion to suppress. This supported the belief of the officers that if the car was to be moved they might never thereafter find it.

The district court refused to find, as had the trial court, that the seizure of the parking ticket was not tantamount to a seizure of the car incident to a lawful arrest, that there were no exigent circumstances for its seizure, and that since the arresting officers knew that they wanted to seize the automobile they should have procured a search warrant for it. The court erroneously relied on the decision of this Court in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971) for its finding. *Coolidge* was not decided

until over three years after the officers had seized respondent's automobile and the trial court had ruled upon the motion to suppress.

The United States Court of Appeals for the Sixth Circuit followed the reasoning of the district court and affirmed its decision on appeal.

This is not a *Coolidge* case. Although the officers intended to seize respondent's car, they could not have procured a search warrant therefor until they knew its location, and this knowledge came about only after his arrest. Moreover, there were exigent reasons for them to seize the car when and where they did. Otherwise they should have had to place a guard on it until a search warrant could be procured which, in effect, would have produced the same intrusion on the rights of respondent as would the seizure itself. *Chambers v. Maroney*, 399 U.S. 42 (1970).

Argument

The United States Court Of Appeals Erred In Affirming The Decision Of The United States District Court That Paint Samples Taken From Respondent's Automobile Which Had Been Legally Seized As Incident To His Arrest Were Admitted In Evidence At Respondent's Trial In Violation Of His Rights Under The Fourth And Fourteenth Amendments To The Constitution.

The United States District Court authored a lengthy analysis of the allegation that admission of certain paint scrapings at trial against respondent was violative of the Fourth and Fourteenth Amendments. The court concluded that the evidence was not seized as incident to a valid arrest, that respondent did not consent to its seizure, and that the search was not justified as having been seized in "plain view." The court of appeals indicated it was in "full agreement" with this opinion. Petitioner submits

such a conclusion was erroneous. The parking ticket for the car was seized incident to the arrest. The car then was taken by presenting the parking ticket to the parking lot operator and was moved to the police pound where the next morning it was examined.

Petitioner initially notes that the evidence complained of by respondent in the courts below was paint scrapings taken from the exterior surface of his car while it was in the Columbus, Ohio, police impounding lot. No evidence was admitted as a result of any intrusion to the car's interior.

Petitioner contends, therefore, that such paint scrapings were properly admitted against respondent at trial as such scrapings were the result of a scientific examination of an instrumentality of the crime for which respondent was arrested. Cf: *Cotton v. United States,* 371 F. 2d 385 (9th Cir., 1967); *United States v. Graham,* 391 F. 2d 439 (6th Cir., 1968), wherein it is stated at page 442:

> "While it is true that the Constitutional proscription against unreasonable searches and seizures extends to automobiles, since they, like houses, legitimately serve as repositories for personal effects and belongings of the owners and occupants, this is immaterial to the question presented at bar. No articles of evidence separate from and independent of the cars themselves were obtained as a result of the police examination, as was true in such cases as *Preston v. United States,* 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964), and Cooper v. State of California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 ((1967)."

See also: *United States v. Ware,* 457 F.2d 828 (7th Cir., 1972); *United States v. Johnson,* 413 F.2d 1396 (5ht Cir., 1969).

But assuming that this examination did constitute a search within Fourth Amendment contemplation, which

petitioner does not concede, such was valid as

> ". . . . the search of the car - - - whether the state had legal title to it or not - - - was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." *Cooper v. California*, 386 U.S. 58 (1967).

The record clearly indicates that the inspection of respondent's car was consistent with the reason the car was impounded and with the reason for which respondent was arrested. No intrusion was made to the interior and no general exploratory search for evidence of any kind complained of in the courts below was conducted. The car itself was evidence and the police had complete dominion and control over it. As such, there could be no further trespass committed by a subsequent examination.

Under the circumstances, therefore, it cannot be said that the inspection and examination of the paint samples in question for purposes of identification, which identification was consistent with the reason the car was seized, was unreasonable. See, *United States v. Powers*, 439 F.2d 373 (4th Cir., 1971); *United States v. Johnson*, *supra*.

In its simplest form the situation presented here involves the propriety of the examination of a piece of evidence after seizure. The case of *People v. Teale*, 450 P. 2d 564 (Cal., 1969) speaks to this proposition at footnote 10, p. 572:

> "Only an object reasonably believed to be itself evidence of the charged crime is subject to seizure and, therefore, to detailed examination subsequent to seizure."

Respondent's automobile was reasonably believed to have been evidence of the crime itself.

An analogous situation would be where perhaps a gun believed to have been a murder weapon, or blood-stained

clothing believed to have been worn by a suspected offender were in police possession. Can it be doubted that the police have every right to examine such items consistent with the reasons they were seized? Obviously not. Such then, is the instant situation.

As to the seizure of the car, it must first be noted that "automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968). See also, *Brinegar v. United States*, 338 U.S. 160 (1959); *Carroll v. United States*, 267 U.S. 132 (1925). Petitioner submits that such a proposition is equally applicable to seizures of automobiles as it is to searches. Accordingly, the seizure of the automobile was necessitated by the exigencies of the situation compounded by the fact that the item or evidence to be seized was a large, readily mobile entity such as an automobile.

Additionally, at the time of the seizure and at the time of the trial, the "relevant test (was) not whether it is reasonable to procure a search warrant, but whether the search was reasonable." See: *United States v. Rabinowitz*, 339 U.S. 56 (1950). Petitioner submits that the actions of the investigating authorities were at all times reasonable and consistent with respondent's Fourth Amendment protections.

1) The Courts Below Erred In Ignoring The Finding Of Fact Made By The Trial Court Following A Full *Voir Dire* Hearing On A Motion To Suppress Which Finding Of Fact Was Clearly Supported By The Record.

Prior to trial defense counsel filed several motions one of which was a motion to suppress evidence seized in and about respondent's Pontiac automobile. The complete proceedings on this motion to suppress appears at

pages 4-19A. At pages 19-27A is the complete opinion of the trial court in overruling the motion. The significant part of his ruling was as follows:

> "A complete record of the testimony and state ment of counsel at the various hearings in this case and the memoranda on file will reveal that the State claims not only that the car was used as a means of transportation to and from the secene of the alleged crime but also that it was used to push the Decedent's automobile. Apparently plaster casts and molds of automobile tire tracks and the results of laboratory tests of samples of car paint are expected to be offered as evidence.
>
> 'Again, the question is 'was the seizure and search of the automobile reasonable under all the facts and circum stances of this case?' In this Court's opinion it was.
>
> 'It appeart so this Court that it was reasonable for law enforcement officers to immediately seize a care which their investigation gave them reasonable cause to believe had been used in the commission of the felony charged. The car was in the possession or constructive possession of the Defendant; he had the key and parking ticket for it. It was on a public parking lot adjacent to the building in which public State offices are located and where the Defendant had just been arrested.
>
> 'This is not a case in which a person's home or private structure has been unreasonably invaded. This is not a case in which an individual's person has been reasonably searched.
>
> 'In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this care was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was arrested." (25-26A).

The trial court based its finding upon the fact that the

seizure of the automobile was incident to respondent's arrest, the legality of which never has been questioned. This was based upon the testimony that the parking ticket, however turned over, was the claim for the car which was parked in the vicinity and thusly constructive possession of the automobile had passed from respondent to the officers by the seizure of the parking ticket. Petitioner submits that the vehicle, by virtue of the parking ticket, then was picked up and removed to the police pound where it was held as evidence in the case until it could be subjected to an examination and tests. It was well known to respondent that the investigating officers believed his car had been used in the perpetration or cover up of the murder and that he had every reason for concealing it.

The district court noted that after hearing the motion to suppress, the trial court made no detailed findings of fact. But the trial court was careful to note:

> "No good purpose would be here served by repeating here all the evidentiary matters, oral and written contentions of counsel and all the legal authorities which were cited. As yet the complete record of the hearing has not been transcribed; it will be available to counsel and any reviewing Court. This Court is of the opinion that, to enable counsel adequate time to prepare for trial, it should not delay filing this ruling until that record is available." (20A)

The transcript referred to by the trial judge was before the district court which then deemed it necessary to conduct an evidentiary hearing of its own. Witnesses Mann and Lavery testified in both the state and district court hearings. The district court noted that this testimony in the two hearings did not differ materially. Paul Scott, who did not testify at the motion to suppress hear-

ing, testified in the district court. This testimony did not vary materially from that of David Tingley at the state court hearing.

The district court also was fully aware that the Supreme Court of Ohio had found the car to have been seized incident to a lawful arrest and examined as an instrumentality of the crime and hence was not an illegal search (p. 52 App. B).[1]

The district court ignored the findings of all Ohio courts and found that the search of the car was not incident to the arrest nor seized as an instrumentality of the crime. It also found that the article seized was not in plain view, was not voluntarily relinquished nor were there any exigent circumstances to eliminate the necessity of a search warrant. The court of appeals adopted the findings of the district court and emphasized that there could have been no "exigent circumstances", and no "instrumentality of the crime" hence the seizure of the car without a warrant was illegal. (pp. 30-32 App. A).

There is no doubt that the trial court attempted in every way to insure respondent's claim of illegal search and seizure was thoroughly heard. It also is clear that its decision was not hastily and casually made but rather was made after a thorough study of the law it believed applicable at the time. This was some three and one half years before *Coolidge v. New Hampshire*, supra, so often referred to by the courts below, was decided. It therefore relied upon *Cooper v California*, supra and *United States v Rabinowitz*, supra, and correctly interpreted the ruling of this court in *Warden v Hayden*, 387 US 294 (1967). It found by whatever means the seizure of the automobile was made it was reasonable under existing authority.

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1. *State v Lewis* 22 Ohio St 2d 125, 128.

It is petitioner's contention that both the district court and the court of appeals, in arriving at their decisions, applied their interpretations of *Coolidge v. New Hampshire, supra,* retroactively. This Court never has applied any case dealing with the exclusionary rule retroactively. Thus, in *Linkletter v. Walker,* 381 U.S. 618 (1965) it was held that the rule of *Mapp v. Ohio,* 367 U.S. 643 (1961) was to be applied prospectively. See *Fuller v. Alaska,* 393 U.S. 80 (1968), *Desist v. United States,* 394 U.S. 244 (1969).

This Court has recently held in the case of an alleged involuntary confession, which consistently has been considered to go to the very heart of the fact finding process, that a state court's determination of the merits of a factual issue, made after a hearing and evidenced by a written opinion, shall be correct unless it appears that the merits of the factual dispute were not resolved in the state court hearing, where the trial court summarized the evidence, and concluded that the confessions were voluntary.[2] Where, as here, the evidence is relevant and its admission had no bearing on the innocence or guilt of the respondent, it is believed that the rationale of *Lavallee v. Rose, supra* should apply to a motion to suppress evidence. *Linkletter v Walker, supra.*

After the finding of the trial judge a long trial followed which resulted in respondent's conviction. Both the state court of appeals and the Supreme Court of Ohio found no fault with the findings of the trial court and this Court seemingly noted no grievous error when it denied *certiorari. Lewis v Ohio, supra.*

After a careful review of the trial court's findings by the Ohio Appellate Courts and of this Court on direct appeal a collateral attack in federal habeas corpus should

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[2] *Lavallee v Rose, supra*

not result in a reversal of the state court determination unless it can be found that there was no basis for the trial court's findings. On direct appeal the determinations of the trial court must be upheld unless they are clearly erroneous. This is the generally accepted rule. Although not directly in point, the United States Court of Appeals for the District of Columbia recently stated:

> "The ultimate determination by a trial judge at a suppression hearing as to the issue of consent, whether it be consent to enter or consent to search, is factual in nature. As such, under the guidelines established for this court in Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965), that determination must remain untouched on appeal unless it is "clearly erroneous." See Hoover v. Beto, 467 F.2d 516 (5th Cir. 1972); United States v. J. B. Kramer Grocery Co., Inc., 418 F.2d 987 (8th Cir. 1969); Schoepflin v. United States, 391 F.2d 390 (9th Cir. 1968), cert. denied, 393 U.S. 865, 89 S.Ct. 146, 21 L.Ed.2d 133 (1968); Green v. United States, 128 U.S.App.D.C. 408, 389 F.2d 949 (1967); Villano v. United States, 310 F.2d 680 (10th Cir. 1962). A finding is not "clearly erroneous" unless the reviewing court is left with the definite and firm conviction that a mistake has been made—the finding either is not supported by or is clearly against the weight of the evidence, or induced by an erroneous view of the law. United States v. United States Gypsum Co., 333 U.S. 364, 63 S.Ct. 525, 92 L.Ed. 746 (1948." United States v Sheard 473 F2d 139 (D.C. Cir 1973).

Where a federal habeas corpus petitioner has raised the same contentions in his appeal to state courts that he advances in his habeas petition and the state's fact-finding process was full and fair, presumption of correctness should be applied to the state court's findings. Cf: *Hall v Craven*, 325 F. Supp 516 (C.D. Cal., 1971); *Paulson v Florida*, 360 F. Supp 156 (S.D. Fla., 1973); *United States*

ex rel. Griffin v Vincent, 359 F. Supp 1072 (S.D.N.Y. 1973); *Brown v Wisconsin State Department of Public Welfare*, 457 F.2d 257 (7th Cir., 1972); *Leavitt v Howard*, 462 F.2d 992, (1st Cir., 1972). This Court has stated that the finding of facts of a state court should not be ignored by a federal appellate court. *Cady v Dombrowski* ——— US ——— 37 L. Ed 2d 706 (1973). The Supreme Court of Ohio found that the officers had reasonable grounds to believe that the car had been used in the furtherance of the commission of the crime for which respondent was arrested and that it was an instrumentality thereof. This finding was ignored by the court below which brushed off the instrumentality theory on the basis of *Warden v Hayden supra*. In so doing the court of appeals, not the Ohio Supreme Court, misconstrued the holding in that case.

The facts before the state courts were that the car had been used in the commission of the crime and was evidence whether plain or as an instrumentality. The claim check for the car came into view inadvertantly incident to the lawful arrest of respondent and as such was recognized by this Court as an exception in *Coolidge v New Hampshire*, supra at pages 465-466.

2) The Courts Below Erred In Finding That The Arresting Officers Had Not Seized Respondent's Automobile Incident To A Lawful Arrest After The Trial Court Had Made Such A Finding Based Upon Relevant Evidence Before It.

The trial court found that the seizure of respondent's automobile was incident to a lawful arrest. It based this finding upon the fact that at the time of the arrest or immediately thereafter respondent had turned over a claim check to the law enforcement officers. This is not dis-

puted. The car, by virtue of the parking ticket, was in the possession or constructive possession of the respondent and physically was in a public parking lot adjacent to the building wherein the arrest took place. The officers had reasonable grounds to believe the car had been used in the commission of the crime for which respondent had been arrested. Lastly the court found that the car itself then was seized in the parking lot and removed to the police pound where it was searched (21, 25-26 A). The court found that, "The arrest and seizure of the car were in the same general transaction." (26 A). The court based its findings upon the rationale of *Cooper v. California*, supra.

Petitioner submits that the seizure of the claim check constituted the intrusion into respondent's Fourth Amendment protected area, which intrusion was justified as being incident to the valid arrest of respondent. By seizing the claim check at that time, respondent's control and dominion over the car effectively ceased. Quite obviously, without either of these items, the complete use of the automobile by respondent was limited if not impossible. Respondent's "possession" of the car was dependent upon the claim check.

Of equal effect would have been the only other practical alternative available to the investigating authorities at the time; that being to have placed a guard at the car and make it inaccessible to Scott until a warrant could be obtained to remove the car. In either case, an intrusion into respondent's Constitutionally protected domain would have occurred, either of which would have been justified. This Court has spoken to the practice of allowing a "lesser" intrusion to justify a "greater" intrusion of an individual's Fourth Amendment rights:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car

should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.*" *Chambers v. Maroney, supra*, at 51-52 (1970). (Emphasis supplied)

Although the trial court found that the car was seized incident to a lawful arrest which petitioner contends is fully supported by the record it also found that the subsequent search like that in *Cooper* was a reasonable search of a legally impounded vehicle and was incidental to the crime for which respondent was arrested. See also: (Footnote 12, 403 US 457). *Carroll v United States, supra.*

Never does the majority opinion in *Coolidge v New Hampshire, supra* overrule *Cooper*. *Cooper* is distinguished as a case not based upon a search incident to a lawful arrest but rather upon the seizure of an automobile which the officers reasonable believed to have been used in the commission of the crime.

The trial court did not base its approval of the search solely upon a lawful arrest but also upon the other grounds set forth in *Cooper*. See also: *United States v Francolino*, 367 F2d 1013 (2d Cir., 1966); *Orricer v Erickson*, 471 F.2d 1204 (8th Cir., 1972); *United States v Shye*, 473 F.2d 1061 (6th Cir., 1973); *Commonwealth v Smith*, 304 A. 2d 456 (Pa. 1973); *Drummond v United States*, 350 F.2d 983 (8th Cir., 1965); *United States v Cecil*, 457 F.2d 1178 (8th Cir., 1972); *United States v Gulledge*, 469

F.2d 713 (5th Cir., 1972); *Smith v Slayton*, 484 F.2d 1188 (4th Cir., 1973); *Thompson v United States* 484 F.2d 942 (6th Cir., 1973).

3) The Courts Below Erred In Finding That It Was Illegal To Remove An Automobile From A Nearby Public Parking Lot To The Police Pound Ffor Examition By Technical Experts When It Was Removed After A Valid Seizure Of A Parking Ticket To The Automobile By The Arresting Officers Who Had Good Reason To Believe It To Have Been Used In The Commission Of A Crime For Which Respondent Was Arrested.

The arresting officers believed, and had good reason to believe, that respondent's automobile had been used to push the victim's automobile over a river bank. In so doing the rear of the victim's car had been damaged and flecks of foreign paint were deposited thereon. This paint was removed and samples were taken and forwarded to the F.B.I. laboratory. Based upon the FBI report it was learned that the paint could have come from a gold colored 1966 Pontiac, the same as that of respondent. Investigation disclosed that respondent's 1966 Pontiac had been taken to a body shop shortly after the murder for front end repairs. The officers, therefore, considered the Pontiac automobile to be valid evidence to be used in the proof of the commission of the crime. The location of the car became known to the officers at the time of arrest. Even though the car was not under the direct control of respondent in the attorney general's office the claim check was turned over to the officers who then had constructive possession of the car (76-79A).

The officers were interested primarily in two areas, the color and texture of the paint of the car and the make and pattern of the front tires. This examination of the car

could not be done properly on a busy parking lot and was removed to the police pound where the inspection was completed.

It is petitioner's contention that the police had a right to inspect the car on the spot and that, therefore, they had a right to have it removed to the pound for processing. Cf: *Carlton v Estelle* 480 F2d 759 (5th Cir., 1973)

At the outset, although this argument was not accepted by the courts below, petitioner contends that where respondent produced the parking ticket after his arrest, it was in plain view of the officers. He indicated that it was a parking ticket for the car and the officers wanted the car. They therefore took constructive possession of the car at that time and deprived respondent or his agents of the ability to take it. It is emphasized that the evidence in plain view was pertinent to the crime alleged and was not seized as a result of an exploratory search. It therefore was admissable under the "plain view" doctrine. Cf: *Harris v United States*, 390 US 234, 236 (1968); *United States v Sheard*, supra; *United States v Bright*, 471 F2d 723 (5th Cir., 1973); *United States v Candella*, 469 F.2d 173 (2d Cir., 1972); *United States v Cecil, supra.*

The court below refused to accept the "plain view" theory for the reason that there were no exigent circumstances to seize the automobile without a warrant. This, of course, is a completely erroneous finding. Both respondent and his attorney Paul Scott testified in the district court evidentiary hearing that respondent wanted Scott to get the car and take it to his family. If this had been done the automobile, as did the brief case which was not seized and was not subsequently available to the police, pending the procurement of a search warrant, could have disappeared and never been found (48-49, 64-65 A). Had a guard been placed over the car to prevent its removal pending the procurement of a search

warrant respondent would have been in the same relative position with respect to the inspection of the car as he was under the immediate seizure. This Court in *Chambers v Maroney, supra,* stated as page 51-52:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

See also: *United States v Bozada* 473 F.2d 389 (8th Cir., 1973) *cert. denied* 93 S Ct 2161; *United States v Walen* 479 F.2d 467 (3rd Cir 1973).

Petitioner contends and earnestly believes that the seizure of the car at that time was necessitated as the authorities had reason to believe that a very valuable piece of evidence was likely to be moved or destroyed. The record bears out their fears. During the interrogation session of October 10, 1967, in the attorney general's office, respondent was made acutely aware of how the authorities felt the car figured into the crime and what part of the car was thought to have been used. There was no reason to think that respondent could not have contacted someone, friends or family, with instructions to dispose of the car or conceal it from the authorities. While the courts below could find no facts to justify the seizure on the basis of exigency petitioner believes that the facts, as set out above, which constituted a very real

prospect of concealed evidence, necessitated the seizure of the car in the manner and method, that it was seized and at the time it was seized.

The facts, which are largely uncontradicted, are ignored by the courts below yet were apparently given much consideration by the trial court, who was in the best position to make the most valid judgment. The courts below are clearly in error. *Cf. LaVallee v. Rose, supra.*

4) The Courts Below Erroneously Held That After An Automobile Had Been Seized Incident To A Lawful Arrest And Was In The Sole Possession Of The Police That It Was Necesasry To Procure A Search Warrant In Order To Examine The Car For Tire And Paint Comparison.

It is not surprising that the courts below would choose to ignore these uncontradicted facts. Both courts were laboring under a misapprehension regarding the necessity of a search warrant. Both courts seem to believe that because a search warrant *might* have been readily obtained to effectuate a seizure at an earlier time, the conditions otherwise justifying a seizure as incident to a valid arrest are either absent or of no force or effect.

The fact is that a search warrant for the automobile could not have been obtained prior to the time of respondent's arrest. When the police had finished their investigation which was the basis for the arrest warrant they had no knowledge of the whereabouts of respondent's automobile. The arrest warrant was issued in Delaware County, Ohio, the situs of the crime. A search warrant issued by the same court would have been invalid in Franklin County, Ohio where the arrest took place. Section 2933.21, Ohio Revised Code, provides that a judge may issue a search warrant within his jurisdiction as opposed to an arrest warrant which may be served in any

county in the state. Section 2941.36, Ohio Revised Code.

Actually the arresting officers did not know the whereabouts of the automobile until respondent produced the parking ticket therefore at 5:30 P.M. on the day in question. This parking ticket, by respondent's own representation under either his or the state's theory, was a claim check for the automobile that they wanted to seize as having been used in the commission of the offense for which respondent had been arrested. It was in plain view to the officers who just had arrested respondent pursuant to a valid arrest warrant. Respondent told them where the car was parked on a public parking lot. They knew that unless they seized the car that it could be removed and never found. Mr. Justice Stewart speaking for the majority opinion in *Coolidge v New Hampshire* supra at page 467-68 stated:

> "The "plain view" doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it."

At pages 469-471 he continued:

> "The second limitation is that the discovery of evidence in plain view must be inadvertent. The ration-

> ale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

At page 472 he concluded:

> "In the light of what has been said, it is apparent that the "plain view" exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves."

The factual situation in our case differs materially from that in *Coolidge*. Unlike *Coolidge* there was no search in progress but the officers did inadvertantly come upon the claim check to the automobile they wanted as evidence. They were not converting a limited search into a general one. While they seized the claim check to the automobile they did not seize respondent's brief case which they believed might have contained incriminating evidence, and in spite of the finding of the courts below there were genuine exigent circumstances for seizing the claim check which was in fact tantamount to seizing the automobile.

Prior to the discovery of the whereabouts of the automobile the officers did not have an opportunity to pro-

cure a search warrant for it. Whereas they knew the automobile's exact description they did not know its location, and they had no expectation of finding it at the office of the attorney general although they did intend to seize it when they found it.

A study of a great number of cases has convinced this writer that the majority decision in *Coolidge* is not clearly understood by either state or federal courts. Not only was there a variation of interpretations of the meaning of the majority opinion, particularly concerning the necessity for a serach warrant, between the various circuit courts of appeal and district courts but there also is evidence of a divergence of opinion between the judges in the various courts of appeals. If this is so it is inconceivable that police officers, few of whom have any legal expertise, possibly can know what to do in any given circumstance. Where an object, which they know to be valuable evidence in a case which they are investigating comes into their view, must they place a guard on it until they can procure a search warrant? In this day of ever increasing crime the hesitancy of a police officer to take prompt action to seize and protect evidence could be fatal to the protection to which the public is entitled. Seldom would a prompt seizure of incriminating evidence interfere with the Fourth Amendment Rights of the innocent.

At the time the seizure in this case was made the officers were not aware of *Coolidge* which came later. If properly schooled they were familiar with *Cooper* and *Carroll*. Even *Chambers* was not available to them. They did know that it was not a *Preston* case for the reason that the evidence they sought was relevant to the crime for which they had arrested respondent. Mr. Justice Black, in his dissenting opinion, noted that *Coolidge* in-

troduced a new rule to enforce proper police conduct. At page 488-489 he stated:

> "The majority holds that evidence it views as improperly seized in violation of its ever changing concept of the Fourth Amendment is inadmissible. The majority treats the exclusionary rule as a judge-made rule of evidence designed and utilized to enforce the majority's own notions of proper police conduct. The Court today announces its new rules of police procedure in the name of the Fourth Amendment, then holds that evidence seized in violation of the new "guidelines" is automatically inadmissible at trial. The majority does not purport to rely in the Fifth Amendment to exclude the evidence in this case. Indeed, it could not. The majority prefers instead to rely in "changing times" and the Court's role as it sees it, as the administrator in charge of regulating the contacts of officials with citizens. The majority states that in the absence of a better means of regulation, it applies a court-created rule of evidence.
>
> I readily concede that there is much recent precedent for the majority's present announcement of yet another new set of police operating procedures. By invoking this rulemaking power found not in the words but somewhere in the "spirit" of the Fourth Amendment, the Court has expanded that Amendment beyond recognition. And each new step is justified as merely a logical extension of the step before."

While the police officer did not have the benefit of the *Coolidge* or *Chambers* decisions the courts below did. Yet they ignored the holding of this Court in *Chambers v Maroney supra*. As Mr. Justice Black stated at page 504:

> "Moreover, under our decision last Term in *Chambers v Maroney*, 399 US 42, 26 L Ed 2d 419, 90 S Ct 1975 (1970), the police were entitled not only to seize petitioner's car but also to search the car after

it had been taken to the police station. The police had probable cause to believe that the car had been used in the commission of the murder and that it contained evidence of the crime. Under *Carroll v United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), and *Chambers v Maroney, supra*, such belief was sufficient justification for the seizure and the search of petitioner's automobile."

In *Coolidge* Mr. Justice White, in a thoroughly documented dissenting opinion stated:

"For Fourth Amendment purposes, the difference between a moving and movable vehicle is tenuous at best. It is a metaphysical distinction without roots in the commonsense standard of reasonableness governing search and seizure cases. Distinguishing the case before us from the Carroll-Chambers line of cases further enmeshes Fourth Amendment law in litigation breeding refinements having little relation to reality. I suggest that in the interest of coherence and credibility we either overrule our prior cases and treat automobiles precisely as we do houses or apply those cases to readily movable as well as moving vehicles and thus treat searches of automobiles are we do the arrest of a person. By either course we might bring some modicum of certainty to Fourth Amendment law and give the law enforcement officers some slight guidance in how they are to conduct themselves." *Coolidge v New Hampshire, supra*, at page 527.

In the interest of proper law enforcement and the protection of the public it is urged that the latter alternative be adopted. It is believed that this Court has embarked upon such a step in this direction in the recent case of *Cady v Dombrowski, supra*. Although the facts in *Cady* are not the same as those herein the majority of the court likened them to those in *Harris v United States*, supra and *Cooper v California*, supra. In *Harris* the petitioner had been arrested for robbery and his car

impounded as evidence. Here respondent was arrested for murder and his car impounded as evidence. In *Cooper* the petitioner was arrested for selling heroin and his car impounded pending forfeiture proceedings. In either *Harris* or *Cooper* the police could have gotten a search warrant. In summing up the basis for holding the search to be valid Mr. Justice Rehnquist stated:

> "The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determing whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decision, see *Cooper, supra, Harris, supra, Chambers, supra,* and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments." *Cady v Dombrowski,* 37 L Ed 2d at page 718.

Here the automobile was parked on a public parking lot. It was not in respondent's home or on his property. It could be readily moved. Had the officers not impounded it they would have run the risk of losing valuable evidence believed by them to be such. Had the car been moved and concealed pending their procuring a search

warrant they could have been found derelict in their duty for letting the evidence disappear.

Any intrusion into respondent's automobile was a very limited one. Paint samples were taken and tire casts were made. This appears to be a far less intrusion than that of taking a sample of scrapings from the fingernails of a strangulation-murder suspect, over his protest and without a warrant. In *Cupp v Murphy*, —— US —— 35 L Ed 2d 900 this Court held at page 906:

> "On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments."

Petitioner believes that there was no Fourth and Fourteenth Amendment violation here.

CONCLUSION

Petitioner feels that the courts below have improperly gauged the impact of *Coolidge v New Hampshire, supra,* in the process of invalidating the seizure of respondent's automobile. While on the surface the case seems to be factually in point with the instant situation, and while the state has, in all the cases, attempted to justify the search for a number of similar reasons, there are significant factors which are not present in the instant case, and which make the instant seizure allowable. In *Coolidge* an individual's private property was entered and his automobile taken therefrom. In *Coolidge* his automoble was where there was no prospect that it was about to be moved. Petitioner would not contest if respondent's car had been seized from his private property and there were no real prospects of the car being moved.

In the instant situation, the intrusion into respondent's control over his car was not dependent upon an invasion of his physical premises. The car itself was seized from a public parking lot, upon which police needed no specific authorization to enter.

In *Coolidge* there was no significant prospect of the car in question being moved while in the instant situation such was actually a certainty. While the authorities in our case had information relating to the car, prior to the seizure, there is no indication such information amounted to probable cause to obtain a warrant. Nor can it be said that on the morning of the interrogation it was reasonable to procure a warrant considering the mobile nature of the item to be seized and the uncertainty of its location at any particular time. Petitioner believes rather, that this decision in *Cady v Dombrowski, supra,* should govern this case.

Accordingly, petitioner submits that the admission of the paint scrapings in question were admitted at respondent's trial without violating his rights under the Fourth and Fourteenth Amendments to the Constitution. A finding to the contrary by the courts below and the granting of the Writ of Habeas Corpus were conclusions clearly erroneous.

Lastly petitioner iterates that the question of the legality of the seizure of the paint samples was, after a motion to suppress and *voir dire* hearing, determined by the trial court. The question was raised by respondent and rejected by two Ohio appellate courts and this Court. Petitioner believes that the district court was in error in relitigating the matter. As enunciated by Mr. Justice Powell in his concurring opinion:

> "Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system." *Schneckloth v Bustamonte*, —— US ____ 36 L Ed 2d 854, 855 (1973).

Respectfully submitted,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

QUESTION PRESENTED

Was the District Court, as affirmed by the United States Court of Appeals, correct in concluding that admission, in Respondent's state criminal trial, of evidence concerning paint samples taken from defendant's car and microscopically examined by police scientists was in violation of Respondent's Fourth Amendment right where the automobile was seized and impounded by police, without a warrant, from a commercial parking lot some distance from the site of defendant's arrest?[1]

[1] In its Petition for Writ of Certiorari the State of Ohio submitted to this Court a single question. (Petition, p. 2) However,

STATEMENT OF THE CASE

Petitioner's history of the case is fairly stated, but Respondent believes that, while Petitioner's recitation of the facts is accurate, there are some additional points which would contribute to a clearer understanding of the case.

First, it might be helpful to the Court to have a short cast of characters to assist in sorting-out the participants in the events at issue:

Sgt. Wm. Lavery: the Deputy Sheriff for Delaware County, Ohio (the location of the murder) in charge of the investigation. (53A)

Division of Criminal Activities: a branch of the Office of the Attorney General of Ohio called in

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in the brief on the merits, Petitioner has presented four questions. (Petitioner's Brief p. 2) While the Merits-Brief questions are primarily restatement and sub-classification of the Petition question, one matter is raised in Question 1 and argued in sections (1), (2) and (3) and the conclusion of the Merits-Brief (Petitioner's Brief pp. 15, 21, 24 and 36 respectively) which includes an issue not embodied in the Petition for Writ of Certiorari or, for that matter, in the appeal to the Sixth Circuit Court of Appeals.

In essence, Petitioner argues that review of the search and seizure issue in federal court collateral proceedings is estopped by the factual determinations and legal conclusions of the Ohio courts, which Petitioner asserts to have been made upon adequate grounds. In support is cited the case of *La Vallee v. Rose*, 410 U.S. 690 (1973) and a portion of the recent concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Respondent believes the issue to be improperly raised by Petitioner by virtue of Rule 40(d)(2) of this Court and the caselaw. See *Irvine v. California*, 347 U.S. 218 at 129 (1954); *J.D. Case Co. v. Borak*, 377 U.S. 426 (1964); *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93 (1957). Counsel had originally intended to raise this matter by motion for the exclusion of the issue from consideration but was advised by the Office of the Clerk of this Court that the better practice would be to footnote the contention in Respondent's brief.

by the Delaware County Sheriff to assist in the investigation of this case. (69-70A)

Clyde Mann & Jim Heise: investigators for the Division of Criminal Activities. (5A & 69A)

David Kessler: an attorney who was Chief of the Division of Criminal Activities and who acted as a special Prosecuting Attorney in the trial of this case. (5A &68A)

David E. Tingley: the attorney initially called by defendant on the day of his arrest. (11-13A)

Paul Scott: an attorney who was called into the case by Tingley and who became trial counsel for defendant. (44-45A)

Next, it may be helpful to elaborate upon the chronology of some of the events leading up to the arrest of defendant and seizure of his car. The body of the murder victim, Radcliff, was found on Wednesday, July 19, 1967. (57A) By the following Monday, July 24, 1967, the investigation of the case had begun to focus upon Mr. Lewis, and Deputy Sheriff Lavery by then was interested in Lewis's car. (54A & 57A) On that date, Lavery went to defendant's place of business, questioned defendant, asked for and was given a description of defendant's car, and had the car pointed out to him by defendant. (54A)

Sgt. Lavery and Mr. Mann again talked with Lewis on September 28, 1967 and "at this time the investigation had focused in on [Lewis] as the prime suspect." (Opinion of District Court, Appendix to Pet. for Cert., p. 40)

On October 9, 1967 (77 days after the July 24th interrogation of defendant at his place of business) Mann called defendant and requested that he appear the following day at the office of the Division of Criminal Activities in Columbus, Ohio. (62A & 64A)

At about 8:00 a.m. on October 10th Sgt. Lavery obtained an arrest warrant for defendant from a Delaware County Municipal Judge and came to Columbus (which is in adjoining Franklin County) for the meeting with defendant at 10:00 a.m. (55A)

Mr. Lewis complied with the request to appear and drove the car in question to the interrogation session, parking it in a commercial parking lot a quarter to a half block from the building where the Division of Criminal Activities office was located. (63A) Sgt. Lavery knew during the questioning of defendant, prior to his arrest, that he had driven the car to the interrogation session. (60-61A)

Defendant was not actually informed of the warrant or placed under arrest until late in the afternoon of October 10th (66A-67A), but he was held in close custody throughout the day. (67A) He was allowed only two communications with persons other than the investigators during the course of the day; about noon, he was permitted to call the trade school where he taught to let them know he would not be able to meet with his class that day (65A), and later he was permitted to call his attorney, Mr. Tingley. (66A) The only time during the day Lewis and his interrogators left the offices of the Division of Criminal Activities was during a brief journey in the afternoon to Lewis's home where Lavery and Heise, in the company and with the consent of the defendant, searched his home for a shotgun. (55A & 66A)

Defendant was finally arrested sometime after 3:30 p.m. on October 10, 1967. (67A) Although they ultimately obtained possession of the claim check and keys to the car, the investigators themselves did not actually have any contact with the car. (8A) It appears that Mr. Mann or Mr. Heise simply called the Columbus Police Department and asked that a wrecker be dispatched to impound the car. (8A) There is conflict in the

testimony of Sgt. Lavery who was, of course, the only actual police official present. In a deposition prior to the hearing on defendant's pretrial motion to suppress, Sgt. Lavery had testified that he had not had "anything to do with the automobile part of this transaction [on October 10th]." (16A) Later, at the motion to suppress hearing, Lavery said he had asked Mann to request the impoundment (15A), but Mann indicated he was not acting under Lavery's orders and that Heise had actually called for the wrecker. (8A)

Sgt. Lavery testified in the evidentiary hearing in the District Court that, at least by the time he obtained the arrest warrant on the morning of October 10th, he already knew the following facts specifically pertaining to the car, in addition to other evidence linking the defendant to the crime:

(1) A witness near the scene of the crime heard shots and then saw a gold colored General Motors vehicle leaving the area.

(2) Lewis owned a gold colored 1966 Pontiac.

(3) The victim's car had been pushed over an embankment by another car leaving paint on the bumper of the victim's car.

(4) The foreign paint was from a gold 1965 or 1966 G.M. car.

(5) Lewis's car was taken to a body shop for body repairs shortly after the day of the killing.

(75-77A)

Despite this information, Lavery "saw no reason for a search warrant," (54A) and intended to seize the car "one way or another." (78A) This was confirmed at the evidentiary hearing by Mann, who testified that he knew "throughout the whole day" (October 10th) that they wanted to seize the car. (73-74A) No search warrant was ever sought or obtained. (54A)

SUMMARY OF ARGUMENT

Respondent believes the Petitioner's organizational concept to be inimical to a clear presentation of the issues as Respondent sees them. For this reason, and because of the close factual and logical affinity of this case and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the argument here will be structured primarily along the lines of Part II of the *Coolidge* majority opinion.

The basic contention here, as in *Coolidge, supra,* is that the warrantless seizure of defendant's automobile was indefensable in the context of the Fourth Amendment to the United States Constitution. Circumvention of the warrant requirement of that amendment in this case was not reasonable, not necessary, and not excused by any exception to the general mandate.

The seizure and search of the automobile from a commercial parking lot was not incident to the arrest of defendant in a downtown Columbus office building inasmuch as it was carried out at a time and place remote from that arrest. The seizure of car keys and parking lot claim check from defendant's person at the time of arrest did not become the legal equivalent of seizing the car itself.

Exigent circumstances, claimed by the State to have necessitated the warrantless seizure of the car, are not supported factually in the record. The police had a period of nearly three months to act upon information they had concerning the automobile, but they did not present it to a magistrate. Defendant knew during this period that he and his car were the subject of police interest but took no steps to remove the car from the jurisdiction. The police had all information bearing upon probable cause to seize the automobile either on or before the time of defendant's arrest but simply neglected to secure a warrant. In any event, the possibility of the removal of the evidence after the defendant was in police custody but before a

warrant could be obtained could have been obviated by the simple expedient of surveillance.

There was no "plain view" issue here inasmuch as neither the arresting officer nor any other police officer ever saw the car on the day of it's seizure. It was simply impounded by a wrecker dispatched by a local police agency at the request of the investigating officer.

This case is not significantly distinguishable from *Coolidge v. New Hampshire, supra.* Petitioner's artificial distinction between public and private property is untenable. The *Coolidge* decision, in the respects in which it was applied to this case by the U.S. District Court and the Sixth Court of Appeals, is not at variance with the law existing at the time of the seizure in question.

A consent to search was not clearly established in the record and cannot, therefor, form the justification for warrantless search. Respondent denies, and is supported in this denial by his counsel at the time, that consent in any form was given for the seizure of the car but contends that, even in the light of the police version of the facts surrounding the turning over of the keys and claim check, the District Court properly found that there was insufficient indication of an informed consent to the seizure.

Finally, the Petitioner's argument that the search here somehow escapes Fourth Amendment scrutiny or, at least, satisfies it because it was merely a "scientific examination of an instrumentality of a crime" is not supported by the facts of the case or the prior caselaw suggested by the Petitioner.

ARGUMENT

THE COURTS BELOW CORRECTLY GRANTED RESPONDENT RELIEF UPON HIS PETITION FOR WRIT OF HABEAS CORPUS BASED UPON VIOLATION OF RESPONDENT'S FOURTH AMENDMENT RIGHTS IN STATE COURT CRIMINAL PROCEEDINGS IN WHICH EVIDENCE WAS ADMITTED RELATING TO PAINT SCRAPINGS TAKEN FROM DEFENDANT'S AUTOMOBILE WHICH POLICE HAD SEIZED WITHOUT WARRANT AND WITHOUT CONSTITUTIONALLY SUFFICIENT JUSTIFICATION FOR THE WARRANTLESS INTRUSION.

While it is perhaps unnecessary, in this forum, to re-emphasize at any length the first principles of Fourth Amendment interpretation, it is well to begin the discussion with the admonition of Mr. Justice Stewart in *Katz v. United States*, 389 U.S. 347 (1967) and reaffirmed in *Coolidge v. New Hampshire*, 403 U.S. 433, 454-5 (1971):

> ". . . Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U.S. 48, 51 [1951], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-defined exceptions.
>
> *Katz, supra,* at p. 357; citing: *Jones v. United States*, 357 U.S. 493, 497-499 (1958); *Rios v. United States*, 364 U.S. 253, 261 (1960); *Chapman v. United States*, 365 U.S. 610, 613-615 (1961); *Stoner v. California*, 376 U.S. 483, 486-487 (1964).

The warrantless seizure of this defendant's automobile under the circumstances particular to this case was not

brought within the constitutional pale of reasonableness by any of the established exceptions to the warrant mandate, and the evidentiary offspring of that seizure was improperly countenanced in the trial court to the detriment, not only of the defendant, but to the integrity of the judicial process as well. The Fourth Amendment, as applied to the actions of states through the precepts of the Fourteenth Amendment, requires, therefor, the result reached in District Court below and affirmed in the United States Court of Appeals. *Mapp v. Ohio*, 367 U.S. 643 (1961)

A. The "Search Indicent" Exception to the Warrant Requirement Does Not Justify the Seizure of Defendant's Automobile in This Case.

The State of Ohio here argues, as did the State of New Hampshire in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that the search in question is legitimized as an event incident to a valid arrest. Its argument is that, since the officials conducting the interrogation of Respondent on October 10, 1967 in the office of the Attorney General's Division of Criminal Activities gained control of the keys and claim check for his car at the time they finally executed the arrest warrant upon the Defendant, this act of taking constituted the real seizure. They then suggest that, since the taking of the keys and claim check, albeit not the car itself, was contemporaneous in time and place with the arrest, the entire chain of events which followed—the impounding of the car—the taking from the car of paint layer samples for microscopic examination—was justified as "incident" to the arrest. The proposition is based on the premise that possession of the claim check and keys was equivalent to "complete control and dominion over the car"[2] (a contention which

[2] Respondent's Brief p. 22.

Petitioner subsequently withdraws when addressing the question of exigency of circumstances requiring warrantless seizure) and that seizure of these tools of access was, therefore, indistinguishable in a Constitutional sense from seizure of the car itself. Respondent submits that this argument is factually incorrect and that, if applied generally, Petitioner's reasoning would license wholesale disregard of Fourth Amendment values.

The physical objects, the keys and claim check, seized from defendant at the time of his arrest, even if that arrest is assumed to be valid,[3] did not invest the police with the indicia of possession so completely that, by surrendering these objects, defendant surrendered the car. Both objects are merely a means of access—and, for that matter, not an essential or exclusive means—to a physical object that has an integrity quite aside from them. The keys, like the electrical outlet plug of a tape recorder, for example, may to some extent control or limit the operation of mechanical objects but do not thereby consume the identity of the object itself. The parking lot claim check is in the nature of a written document evidencing the short-term lease of physical space to an individual wishing to store certain of his personal property thereon, but it does not, in any sense, invest its possessor with ownership or right of control of the object stored that he did not have without it. In short, the keys and claim check, while symbols of, and mechanical aids to control of the automobile, did not merge with it and become inseparable from it in such a way that seizure of one became seizure of the other. The Fourth Amendment

[3] Respondent, it should be noted, has never conceded the validity of his arrest. In the State courts on direct appeal and in the District Court in his original Petition for Habeas Corpus he raised issues concerning the validity of the arrest. See Issues I and II of Petition for Habeas Corpus (Appendix pp. 30A-31A.) The District Court agreed that the arrest warrant was defective but concluded the officer, nevertheless, had probable cause to arrest. (Appendix to Pet. for Cert. p. 51 Note 12)

is not so crude an instrument as to be unable to make such distinctions.

Petitioner's argument, carried to its logical conclusion, would suggest that if a person was lawfully arrested and a proper search of his person was made in which were found keys to his home, his office, a train station locker, a safety deposit box, his vehicles and perhaps a key to a neighbor's or relative's home, all of these locations represented by the keys would be the legitimate subject of a warrantless search "incident" to the arrest at least to the extent that the searches were related to the reason for which the defendant was arrested. The implications are manifest; in order to enjoy Fourth Amendment protection for his home or other enclaves of privacy the citizen would have to avoid personal possession of any means of entry or use of these entities least he be held to have "constructively possessed" his home and his car in his pants-pocket.

The more important question under the "search incident" exception is whether the police here seized the car itself as an incident of defendant's arrest. Stated specifically, could the police, after questioning and eventually arresting defendant at an office building and upon learning of the presence of defendant's automobile in which they were interested at a nearby commercial parking lot, justifiably, as an incident of the defendant's arrest, call another police agency and ask that agency to go to the parking lot and tow the car to an impoundment area for later search?

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), Justice Stewart reviewed the law of search incident as it applied to cases arising prior to the decision of *Chimel v. California*, 395 U.S. 752 (1969):

> The leading case in the area before *Chimel* was *United States v. Rabinowitz*, 339 U.S. 56 [1950] which was taken to stand "for the proposition, inter alia, that a warrantless search 'incident to a lawful

arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel, supra,* at 760 . . .

. . . [T]his Court has repeatedly held that, even under *Rabinowitz*, [a] search may be incident to an arrest ' "only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest. . . ." ' " *Vale v. Louisiana,* 399 U.S. 30, 33 [1970] quoting from *Shipley v. California*, 395 U.S. 818, 819 [1969] quoting from *Stoner v. California*, 376 U.S. 483, 486 [1964]. (*Emphasis in Shipley.*) Cf. *Agnello v. United States*, 269 U.S., at 30-31 [1926]; *James v. Louisiana*, 382 U.S. 36 [1966]

Coolidge, supra, at p. 456

Here, the spatial relationship between the site of arrest and the location of the seized automobile was, if anything, more remote than it was in *Coolidge*, and none of the special factors which necessitate warrantless intrusion as an incident of a lawful arrest were present. The search cannot, therefor, find its justification in incidence to the arrest.

B. There Were No "Exigent Circumstances" Here Which Counterbalance the Constitutional Preference for Search Warrants.

In considering the arguments raised by Petitioner within the area of the so-called "exigent circumstances" exception to the warrant requirement, as that exception relates to automobiles, it might be well to start with Justice Stewart's reminder that:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.
>
> *Coolidge, supra,* at p. 461.

As this Court in the *Coolidge* case and the District Court and Court of Appeals in this case demonstrated at length, in order for a warrantless search to be justified under the line of cases following *Carroll v. United States*, 267 U.S. 132 (1925), in which there were found to be "exigent circumstances", two conditions must be shown by the State to be present. First, it must be shown that a warrant could not have been obtained in advance. Second, it must be clear that there was a real, not merely a problematical danger that the evidence would be removed or destroyed if time were taken to obtain a warrant. *Coolidge, supra,* at pp. 458-460. In order to prevail on this issue Petitioner must demonstrate that *both* of these factors were present. Respondent maintains that the courts below correctly concluded that *neither* factor was present in the facts.

Judge Kinneary of the District Court in his opinion, after a detailed categorization of the pertinent automobile search cases (Appendix to Pet. for Cert. pp. 57-59), summarized the facts pertaining to this issue:

> . . . The first condition was not met because the reasons establishing probable cause to search the automobile were known to officers days, if not weeks, prior to its seizure and subsequent search. The second condition was not met because the officers knew the whereabouts of the car prior to its search and seizure. They could have obtained a warrant at any time, including the morning of October 10, 1967 or any time following petitioner's arrest. There was no danger a confederate would remove the vehicle and destroy evidence. The murder occurred July 19, 1967. Petitioner was first interviewed July 24, 1967. He was again interviewed on September 28, 1967. He knew that he was a prime suspect when he was requested to meet with investigators on October 10, 1967. Petitioner had already been afforded ample opportunity to destroy

> the evidence. If there were any further danger that a confederate would destroy evidence following petitioner's arrest, the State had ample opportunity to obtain a search warrant and eliminate the risk.
>
> (Appendix of Pet. for Cert. p. 60)

Contrary to the unsupported assertions of Petitioner, there is no indication in the record whatever that the police did not have general knowledge of the whereabouts of the defendant, his residence, his business locations, and his automobile during the nearly three months, which intervened between the murder and defendant's arrest. Despite ample opportunity to develop, at the evidentiary hearing in the District Court, any facts which might support this theory, the State has offered no testimony to show a lack of knowledge of the location of the car at any time except the early portion of October 10, 1967. Even with respect to that period, there is no indication that the officer's lack of knowledge about the precise location of the car that day was the product of anything other than their own failure to ask Lewis where it was? When asked, he told them where it was.

Petitioner has manufactured a ghost in support of its contention that exigencies of circumstance created a need for warrantless seizure of the car on October 10, 1967. The State constantly alludes to the possibility that some unnamed confederate, notified in some unspecified way by the defendant as he was held in police custody, would come and, without keys or claim check, remove the car before a warrant could be secured.

There is no indication whatever that Respondent had attempted to hide or dispose of his car, despite the fact that he had known for some eleven weeks that the police were interested in it. That Respondent chose to drive this particular vehicle to the October 10th interrogating session to which he had been "invited" and at which he voluntarily appeared certainly bespeaks no plan on his

part to secrete the car in such a way as to frustrate any attempt to secure a warrant for its seizure; on the contrary, it seems to justify the opposite conclusion. The fact that the police had called the day before and "invited" the defendant to come downtown the next day to "talk" to them about the murder they were investigating would seem to indicate very little real concern on their part that the defendant would abscond or otherwise frustrate their investigation.

The fact that Respondent, at the time of his arrest, attempted to turn the car over to his attorney for delivery to his home does not in any sense equate this case with those in which a danger existed that a confederate in crime would destroy evidence if seizure were not accomplished immediately. No testimony has ever been tendered that this crime or its aftermath involved confederates, nor has it ever been suggested that the investigating officers believed as much in October of 1967. Surely, Petitioner does not suggest that Respondent's trial attorney, Mr. Scott, an officer of the court, would participate in the destruction of evidence. Surely, there is a difference between moving a car for the convenience of a client's family and spiriting it out of the jurisdiction. In any event, Mr. Scott did, under protest, turn over the keys and claim check to the police prior to the seizure of the automobile, thus removing even this theoretical exigency if we accept the Petitioner's prior argument that possession of these items effectively immobilized the vehicle.

The question then arises as to whether the officers, having forgone prior opportunity for more than eleven weeks to secure and execute a search warrant, can, in effect, create "exigent circumstances" simply by saying that at the particular instant they chose to seize the car they did not have sufficient knowledge of its location *at that moment* to enable them to secure a warrant, despite a general availability of the car at known locations and

knowledge of facts pertaining to probable cause long before that time. Given this reasoning, any warrantless search of a movable object could be justified by such a conveniently manufactured exigency.

But from a factual standpoint even this "exigency" did not exist. It is not disputed that during the course of the questioning on Tuesday, October 10th between the hours of 10:00 A.M. and 5:30 P.M. the investigating officials became aware of the exact location of the car and became possessed of the means of access to it, the keys and claim check. Respondent was, by this time, under arrest in the office of the Attorney General of Ohio, Division of Criminal Activities, and could not, in any event, have communicated with the mythical "confederate" postulated by the State of Ohio. Certainly, at this point in time, the police were in a position to seek a search warrant from a magistrate within Franklin County, the Municipal Court of which is located only a few blocks from the offices where the interrogation was being conducted.

If it is assumed, *arguendo*, that some exigency did exist, and that there was some real possibility of the disappearance of the car, despite the control by the police of the defendant, the keys, and the claim check, it is pertinent to discuss another alternative available to the police in the particular circumstances of this case—the surveillance of the car in the parking lot. Petitioner has argued, claiming support from *Chambers v. Maroney*, 399 U.S. 42 (1971)[4] that this would be indistinguishable from outright seizure and that this is not a permissible

[4] That the lower Courts are not totally clear upon the impact upon *Chambers, supra,* of *Coolidge, supra,* with respect to this issue is perhaps best demonstrated by the divergence in the majority and dissenting opinions in *U.S. v. Bozada*, 473 F.2d 389 (8th Cir. 1973).

alternative under the Fourth Amendment. Respondent suggests that the surveillance question, if not mooted, as Respondent believes it to be, by the lack of any real exigent circumstances here, is deserving of some discussion.

Police surveillance of the car in this case until a warrant could be applied for would not, under the limited circumstances of this case, have constituted "seizure" any more than surveillance of a suspect by the police constitutes "arrest" of that individual. It is within the legitimate purview of police authority to observe and investigate in order to obtain factual details for presentation to judicial officers responsible for making probable cause determinations. Observation alone here would have been sufficient to preserve the opportunity to secure and execute a warrant.

In what real way would the defendant's rights have been compromised? The defendant's privacy interest in the object would not have been violated. His ability to use the car was already foreclosed by his arrest. It would have, in this case, taken only a brief period of time to present the warrant arguments to a magistrate. If the warrant had been issued, defendant–and the public–would have had the benefit of a judicial determination of probable cause. If the warrant had not been issued, for failure of the alleged probable cause, an improper search would have thereby been prevented. In either event, the costs in terms of law enforcement resources would have been minimal, and the savings in terms of subsequent judicial labor would have been substantial.

Although the Respondent maintains, as did the District Court, that the initial seizure of the car from the downtown parking lot was the basic and incurable violation of Respondent's Fourth Amendment right and that all the events which flowed from it were necessarily tainted by it, the warrantless searches of and seizures from the car two days after it was taken to the Columbus

Police Impounding Lot most certainly cannot be justified in terms of any "exigency". At that point the police had absolute control of the vehicle and unlimited opportunity to secure a warrant, yet they simply did not trouble themselves to do so.

This case is not in any way analogous to the situation with which this Court dealt in *Chambers v. Maroney*, 399 U.S. 42 (1971), where the defendant was arrested in his car and the police, having proper authority to search the car incident to the arrest, merely moved it to the police station before doing so; here there was no foundation for a warrantless search at the point where the car was found and, therefor, no justification for a later search at the impoundment lot. Nor is the case comparable with the situation in *Cupp v. Murphy*, 412 U.S. 291 (1973), in which this Court approved, under *Chimel v. California*, 395 U.S. 752 (1969), the admission of evidence about scrapings from the defendant's fingernails given the true exigency of that situation and the extreme parishability of the evidence there in question.

C. The "Plain View" Exception to the Warrant Requirement Is Inapplicable on the Facts of the Case.

Petitioner also argues that the seized automobile was an instrumentality of the crime, found in plain view and seizable as such. This Court in *Coolidge* placed the so-called "plain view" exception in perspective:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertantly across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search

incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges . . .

* * * * *

The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence . . .

* * * * *

The second limitation is that the discovery of evidence in plain view must be inadvertant . . . But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."

Coolidge, supra, at pp. 466-471

As in *Coolidge*, the facts here simply do not support a "plain view" exception to the warrant requirement. The object involved was, as in *Coolidge*, an automobile, not "contraband or stolen goods or objects dangerous in themselves." The police had the information bearing upon probable cause to secure and execute a warrant for weeks. The police here also had a prior intention to seize the automobile, and their discovery of it was in no sense inadvertent. Moreover, the investigating officer here never actually saw the vehicle at all on the day of its seizure; he

merely had someone call for a wrecker to impound the vehicle. As the Sixth Circuit Court of Appeals suggests in its opinion:

> . . . Stated in its simplest form, there can be no "plain view" where there is no "view" at all. To attach such an extension to the plain view exception to the warrant requirement would undercut the very foundations of fourth amendment protections and consequently such a proposition is untenable . . .
>
> (Appendix to Pet. for Cert. p. 32)

Petitioner argues the inapplicability of the entire *Coolidge* doctrine to the instant case on a theory that the "viewing" and the seizure of the automobile here took place on "public" rather than "private" property. Respondent submits, however, that Petitioner is incorrect both as to its factual conclusion and as to its legal interpretation of the *Coolidge* decision.

From a factual standpoint, it is clear that the original seizure of the automobile took place upon an attended commercial parking lot on which Respondent had, in effect, rented space, locked his car and taken the keys with him. The very purpose of such a parking lot is to provide a kind of secure sanctuary for a person's chattle property away from the vulnerability of truly public areas. The situation is analogous to that in *Katz v. United States*, 389 U.S. 347, 885 S.Ct. 507, 19 L.Ed. 2d 576 (1967), where this Court held that conversation from a "public" telephone booth was subject to Fourth Amendment protection:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private even in an area accessible to the public may be constitutionally protected . . ."
>
> *Katz, supra,* at pp. 351-2

The *Coolidge* doctrine simply does not admit to the artificial "public" vs. "private" legal interpretation ascribed to it by the Petitioner.

D. There Was No Consent To Search.

At least in the way it has presented the facts of this case, if not directly in argument, the State of Ohio implies that defendant consented to the seizure and subsequent search of his automobile by making, according to police testimony, a request that his car be taken by the police for "safekeeping." It is sufficient here to note that the District Court took great pains to review all of the testimony pertaining to the claim of consent, and that it concluded from this review that, even if the testimony by defendant and his attorney disputing the alleged request were to be disregarded and only the police testimony considered, there still was a failure by the State ot demonstrate the clear and unequivocal consent necessary to justify a warrantless search. (Appendix to Pet. for Cert. pp. 52-55) The Court of Appeals found no need to re-examine this comprehensive decussion. (Appendix to Pet. for Cert. p. 30)

E. Petitioner's Contention That the Police Action Was Excused as "A Scientific Examination of an Instrumentality of a Crime" Is Not Valid.

Laced throughout Petitioner's other arguments is an elusive concept which seems to have been drawn somewhere from the recesses of *Warden v. Haden*, 387 U.S. 294 (1967) and *Cooper v. California*, 386 U.S. 58 (1967), in which Petitioner seeks to vindicate the taking of the automobile and the microscopic analysis of it's subsurface paint layers as merely a "scientific examination of an instrumentality of a crime" related to the "reason for which the car was seized and the defendant arrested." The argument seems to have several branches. In some

instances the State appears to be saying that, because this car was, in their view, an "instrumentality" of the crime and, because all that was done to it was to subject it, or a part of it, to scientific analysis, the Fourth Amendment does not really come into play at all, and there is not actually a seizure or search in any Constitutional sense. In other instances, however, the Petitioner takes another tact and suggests, without precisely saying so, that there was a search and seizure of Fourth Amendment significance but that it was, or ought to be, validated by a new exception to the warrant requirement revolving around the notion of "instrumentality." Respondent would suggest that these notions are first, inapplicable to the facts of the case, second, based upon inappropriate extrapolation from the caselaw cited, and third, suggestive of a procedure which, if sanctioned and applied generally, would severely damage Fourth Amendment values.

In the first place, it is at least arguable as to whether the car can accurately be classified as an "instrumentality of the crime" in this case. It was not the police theory here that the car they sought was the murder weapon itself; the killing had been done with a shotgun. The role of the car, according to police, was merely that it was used after the murder to push the victim's car over an embankment so that it could not be seen and then to leave the scene of the crime. In that sense, it is not the instrument of commission or the object of the crime itself but an evidentiary item.

But the distinction between an "instrumentality" and other items relating to a crime is of no importance in view of the holding of this Court in *Warden v. Haden*, 387 U.S. 294 (1967):

> Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or

> contraband. On its face, the provision assures the "right of people to be secure in their person, houses, papers, and effects . . . ." without regard to the use to which any of these things are applied . . .
>
> *Warden v. Haden, supra,* at p. 301

Warden v. Haden, as Respondent understands it, simply said that "mere evidence" can be seized in the same way and under the same restrictions as "instrumentalities." Petitioner seeks to invert that holding by asking the Court to re-establish the distinction between the types of seizable objects and to place "instrumentalities" in a category beyond the reach of Fourth Amendment protection. The suggestion ignores the underlying basis of the *Warden* decision which was that the Fourth Amendment was not directed to the issue of property but, rather, to the right of privacy:

> . . . [N]othing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the contrary may be true . . .
>
> *Warden, supra,* at p. 302

Petitioner's reliance on *Cooper v. California,* 386 U.S. 58 (1967) is similarly misplaced. Involved in *Cooper, supra,* was the search of a glove compartment of an automobile that had been impounded upon the defendant's arrest pursuant to a California statute authorizing impoundment pending forfeiture proceedings where a vehicle was involved in the transportation of narcotics. The impoundment here was based upon no such statutory authority. Similarly, the Court's recent decision in *Cady v. Dombrowski,* 413 U.S. 433 (1973) does not support Petitioner's case because there, as in *Cooper, supra,* the police had "exercised custody" over the vehicle on the highway and, in connection with that custody, had merely searched the car for a police service revolver they reasonably believed to be in the car and

which they feared might be stolen and in that search unexpectedly found incriminating evidence. Though these cases refer to the relationship between the reason for the searches and the reason for which the automobiles were being held, they are both founded upon situations, unlike the instant case, in which the police already had legitimate custody, of one sort or another, of the vehicle in question.

Finally, the words "scientific examination" do not, in and of themselves, impart some magic which counteracts Constitutional necessities as the Petitioner seems to imply. A search is not made legitimate in Fourth Amendment terms simply because it is done through a microscope rather than with the naked eye. In order to "scientifically examine" the layers of paint below the visible surface of the car here, it was necessary for the police to physically remove a portion of the paint from the car, and that removal, no matter how minute the sample, clearly constituted a seizure. See footnote 10 of the District Court's Opinion. (Appendix to Pet. for Cert. p. 50)

CONCLUSION

Petitioner has suggested to the Court that the tenor of the time bids a relaxation of strictures upon police conduct and has predicted that the loosening of the warrant requirements in cases such as this will "[s]eldom . . . interfere with the Fourth Amendment Rights of the innocent." (Petitioner's Brief, p. 30)

The Bill of Rights, written in times no less tumultous than our own, is not a quantative standard under which the security of the citizen is to be respected insofaras it may be practical, given temporal necessities. Rather, it provides an absolute standard forbiding in each instance and in each age the encroachment of the State upon individual perogative except within the narrow limits which it specifies.

The State of Ohio here asks this Court to approve the warrantless search and seizure of an automobile in circumstances which in no way necessitated the bypassing of warrant procedures. In the submission of Respondent, the Fourth Amendment does not and should not be held to encourage activity of the type here in question.

The decision of the United States District Court, affirmed by the United States Court of Appeals, directed that the writ of habeas corpus issue and that Arthur Ben Lewis, Jr. be released from custody unless the State of Ohio initiates action for a new trial within a stated period. Those decisions should be affirmed by this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72–1603

HAROLD J. CARDWELL, WARDEN, OHIO PENITENTIARY, PETITIONER

v.

ARTHUR BEN LEWIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has a direct interest in the standard governing the power of law enforcement officers to search and seize an automobile when they have probable cause to believe that the vehicle was used in the commission of an offense. Law enforcement officers employed by agencies of the United States, including the Metropolitan Police Force of the District of Columbia, frequently encounter situations similar to that at issue here. Moreover, an Act of Congress (49 U.S.C. 781, *et seq.*) expressly authorizes the warrantless seizure of a vehicle based upon probable cause to believe

that it has been used to transport contraband. The holding of the court of appeals, if sustained, may substantially affect the validity of that statute. Finally, to the extent that the case involves the standards to be employed generally in determining the validity of warrantless searches, it will have a substantial impact on a wide range of federal law enforcement activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises once again an issue which has sparked the "conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law" (*Coolidge* v. *New Hampshire,* 403 U.S. 443, 474). This conflict has been "caused by disagreement over the importance of requiring law enforcement officers to secure warrants" (*ibid.*). The underlying basis of that disagreement was summarized by Mr. Justice Stewart in *Coolidge* (*id.* at 474–475; footnotes omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

This case (unlike *Coolidge*) does not involve "a search or seizure carried out on a suspect's premises" and does not therefore implicate the "accepted * * * principle, that [such] a search or seizure * * * without a warrant is *per se* unreasonable, unless the police officer can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'" (*ibid.*). Rather, it involves the kind of search and seizure with regard to which there has been uncertainty and disagreement "about the basic rules to be applied" (*id.* at 475). As Judge Gibson recently wrote in an opinion for the Court of Appeals for the Eighth Circuit (*United States* v. *Lawson*, 487 F. 2d 468, 470):

> The problem of automobile searches and their relationship to the warrant requirements of the Fourth Amendment has been a perplexing one for the courts. Without the assistance of defini-

> tive guidelines (indeed guidelines attempting to apply the general requirements of the Fourth Amendment in this area are likely to be of little assistance in the varying factual circumstances presented by concrete cases), the courts have attempted to apply general Fourth Amendment principles, assisted by what applicable language they could discern from the Supreme Court cases, to resolve situations probably never contemplated by the drafters of the Fourth Amendment or the courts. Lower courts have been hampered in this process by a seeming lack of consistency in the Supreme Court cases dealing with automobile searches, the inconsistencies no doubt being due to the manifold considerations that bear with unequal weight on varying aspects of the problem. * * *[1]

The issue presented here is whether the seizure of an automobile parked on a public parking lot, based upon probable cause to believe that it was used in the commission of a murder, is invalid because a warrant could have been obtained. It is an issue that has not been resolved by any holding of this Court. If the rule which has been "accepted" with regard to homes and like areas prevails here, and if what transpired here is deemed a search, then the seizure and "search" of the vehicle was invalid because no satisfactory reason appears for the failure of the law enforce-

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[1] See also *Cady* v. *Dombrowski*, 413 U.S. 433, 440, where the Court observed:

"While these general principles [regarding searches] are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web."

ment officers to have obtained a warrant—there appears on the facts of this case to have been no real likelihood that respondent would have destroyed or concealed the evidence sought during the time required to seek and procure a warrant.[2] On the other hand, if the applicable test is dependent not on whether a warrant could have been obtained, but on "whether the search [or seizure] was reasonable" (*United States* v. *Rabinowitz,* 339 U.S. 56, 66), then the seizure of the vehicle was plainly lawful under the Fourth Amendment.

Our submission is that there is no support in the history or language of the Fourth Amendment for the view that every search or seizure—regardless of the nature of the privacy interest at stake—is invalid where a warrant could have been but was not obtained. In making this argument, we are not disputing

[2] This does not appear to be a case in which compliance with the requirement of prompt execution once a warrant is obtained (Ohio Rev. Code, § 2933.24) would have alerted a suspect to the fact that he was under suspicion and possibly have caused him to take evasive action which would have aborted the investigation before it was completed. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 310. Indeed, no effort was apparently made to conceal from respondent that he was under investigation, and we do not understand the State to contend that the failure to obtain a warrant could be justified by fear that the delay incident thereto heightened the risk of removal of the car from the jurisdiction. Thus, a search warrant could have been obtained at the same time the arrest warrant was obtained.

One possible explanation for the failure to obtain a warrant, however, may be found in the Ohio statute regulating the issuance of search warrants, which authorized warrants only to search a "house or place" for various specified items, which may then be seized. Ohio Rev. Code, § 2933.21. Possibly the search of a car would not be viewed as the search of a "house or place."

what "is by now axiomatic, that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause,'" nor are we suggesting that "both the concept of probable cause and the requirement of a warrant" are not to be considered as bearing on the reasonableness of a search. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 277 (Powell, J., concurring). Rather, we submit that whether a search or seizure without a warrant should be held *per se* unreasonable depends on a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination.

The classic example of such a *per se* unreasonable search is one involving the warrantless entry into a home. At common law, at the time of the adoption of the Constitution, it was settled that the privacy of the home could not be invaded except pursuant to a warrant, and then only to search for and seize stolen property. See *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807. That restriction reflected the high regard for the integrity of a man's home, which has been traced back to biblical times (Lasson, *The History and Development of the Fourth Amendment to the United States Constitution,* pp. 13–14 (1937)), and which was reflected in Lord Coke's aphorism that "every man's house is his castle" (*Semayne's Case,* 3 Coke Rep. 91a (1604) (Fraser ed., pt. 5). It is for this reason that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of [a man's] home." *McDonald v. United States,* 335 U.S. 451, 455–456.

A search of an automobile, however, is "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. This Court 'has long distinguished between an automobile and a home or office.'" *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 279 (Powell, J., concurring). As the Supreme Court of Michigan observed in an early automobile search case (*People* v. *Case,* 190 N.W. 289, 292):

> While [automobiles are a] possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process.[2a]

Moreover, "[t]he greater part of the interior of a car is constantly within public view. Automobiles are consistently left with casual bailees who have complete control over the car for extended periods of time. Therefore, the privacy interest in the automobile may be sufficiently inferior to that of a home to justify permitting a less stringent procedure for search." Comments, *The Aftermath of Cooper* v. *California: Warrantless Automobile Search In Illinois,* 1968 U. Ill. Law Forum, 401, 410.

This observation is particularly pertinent to the facts of this case. Here the evidence sought to be suppressed—the paint samples (and related testimony)—was not the product of a search of the automobile. Indeed, the taking of paint samples, which may be likened to the taking of voice prints, fingerprint samples

[2a] See also, *People, ex rel. Winkle* v. *Bannan,* 125 N.W. 2d 875, 884–885 (Mich.); cf. *People* v. *Ubbes,* 132 N.W. 2d 669 (Mich.).

or handwriting exemplars, cannot be characterized as a search within the meaning of the Fourth Amendment. See *United States* v. *Dionisio*, 410 U.S. 1, 15; *United States* v. *Mara*, 410 U.S. 19. Cf. *Cupp* v. *Murphy*, 412 U.S. 291. Moreover, while the defendant's proprietary interest (as distinguished from his privacy interest) was interfered with by the taking of the car, that invasion—if unlawful (*i.e.*, without probable cause)—can be rectified by the return of the property and by some form of monetary compensation. The injury that results from an invasion of privacy, such as a forcible entry and search of a home, is largely irremediable. Accordingly, when all that is really at issue is the validity of a temporary detention of an item of personal property—an automobile—and not the validity of a search of any enclosed area in the interior of the vehicle or any packages in the car, there is even less necessity for the interposition of a neutral and detached magistrate to make the probable cause finding.[3]

We shall show that the approach we propose here—recognizing the lawfulness of warrantless probable cause seizures of automobiles not on private property, and permitting warrantless probable cause searches of automobiles in the absence of special circumstances particularly implicating privacy values—is not foreclosed by any holding of this Court, is consistent with the lan-

[3] The court of appeals held that even if the seizure of the automobile here could be justified, the taking of the paint samples was a search within the meaning of the Fourth Amendment because " 'layers of paint beneath the visible surface of the vehicle' " (Pet. App. 33–34) were examined. But such "metaphysical subtleties" (*Frazier* v. *Cupp*, 394 U.S. 731, 740) cannot realistically be said to transform an otherwise innocuous act into a violation of petitioner's right of privacy under the Fourth Amendment.

guage and history of the Fourth Amendment, and is in accord with procedures followed in England, where the law of search and seizure has evolved in much the same manner as our own law. We accordingly urge the adoption of this approach on the ground that it strikes a proper and desirable balance between the important interests of individual privacy protected by the Fourth Amendment and the legitimate objectives of proper law enforcement.

ARGUMENT

THE WARRANTLESS SEIZURE OF AN AUTOMOBILE, WHEN BASED ON PROBABLE CAUSE, IS NOT *PER SE* UNREASONABLE UNDER THE FOURTH AMENDMENT EVEN IF THERE WAS AN OPPORTUNITY TO OBTAIN A WARRANT

A. PAST HOLDINGS OF THIS COURT IN AUTOMOBILE SEARCH CASES LEAVE OPEN THE QUESTION HERE PRESENTED

The district court (Pet. App. 59) and the court of appeals, which adopted the rationale of the district court, found that the result in this case was mandated by the holding of this Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443. We do not regard the holding of that case as controlling here. Contrary to the conclusion of the district court, the facts in *Coolidge* were not "substantially identical to those in the instant case" (Pet. App. 59). Unlike the instant case, where respondent's automobile was parked on a public parking lot, the automobile in *Coolidge* was parked adjacent to the defendant's home and could only be seized by "entering [his] private property" (403 U.S. at 463, n. 20). Part II–D of the opinion in *Coolidge*—the only relevant portion of the opinion which commanded a majority of the Court—is based on "[t]he most common situation in which Fourth Amendment issues have arisen," namely,

those "in which the police enter the suspect's premises, arrest him, and then carry out a warrantless search and seizure of evidence" (*id.* at 475). The thrust of that part of the opinion is devoted to answering the argument "that warrantless entry for purposes of arrest and warrantless seizure and search of a vehicle and *per se* reasonable, so long as the police have probable cause" (*id.* at 479).[4]

Moreover, in *Cady* v. *Dombrowski*, 413 U.S. 433, the Court distinguished *Coolidge* from the case before it—which involved the removal of an automobile from

[4] Mr. Justice Harlan, who cast the deciding vote, likewise viewed the case as involving "such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of [an offense]." 403 U.S. at 490.

The same emphasis on the entry onto Coolidge's premises is also to be found in that portion of the opinion which did not command a majority of the Court. See, *e.g.*, *id.* at 461, n. 18, where the Court observed:

"But if *Carroll* v. *United States*, 267 U.S. 132, permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of *Carroll*."

Again *id.* at p. 463, n. 20 (distinguishing *Chambers* v. *Maroney*, 399 U.S. 42, from *Coolidge*), Mr. Justice Stewart observed:

"The rationale of *Chambers* is that *given* a justified initial intrustion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. * * *"

the scene of an accident (and its subsequent search)—on the ground that the seizure and search in *Coolidge* was of an automobile "parked adjacent to the dwelling place of the owner" (413 U.S. at 446–447).[5]

It has, however, never been held that a warrantless seizure of an automobile based upon probable cause to believe that it was an instrumentality of a crime is invalid where no entry onto the owner's private property is necessary in order to seize the vehicle. *Preston* v. *United States,* 376 U.S. 364, and *Dyke* v. *Taylor Implement Co.,* 391 U.S. 216, both involved seizures and searches unsupported by a showing of probable cause. "In *Preston, supra,* the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. In *Dyke, supra,* the Court expressly rejected the suggestion that there was probable cause to search the car, 391 U.S., at 221–222." *Chambers* v. *Maroney, supra,* 399 U.S. at 47. Indeed, in *Dyke* the Court expressly left open the issue whether the Fourth Amendment permits "a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse" (391 U.S. at 222). Ultimately, that issue was resolved in *Chambers* v. *Maroney,* 399 U.S. 42, where it was held that such a

[5] Unlike this case, *Coolidge* also involved the validity of a "seizure * * * *and subsequent search* of Coolidge's Pontiac" (403 U.S. at 455). The taking of paint samples from the exterior of respondent's automobile is a markedly lesser intrusion than the full search of the interior of Coolidge's vehicle.

search does not violate the Fourth Amendment. There an automobile was stopped on a public highway and its occupants arrested. The vehicle was then brought to the station house and searched without a warrant (but with probable cause) at a time when the car was no longer movable and there were no exigent circumstances precluding procurement of a warrant. In rejecting the argument that the absence of a warrant invalidated the search of the vehicle, Mr. Justice White wrote (399 U.S. at 51–52);

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[*]

There is one fact that distinguishes this case from *Chambers*. There the vehicle was initially stopped on a public highway, speeding from the scene of the

[*] *Coolidge* v. *New Hampshire*, 403 U.S. 443, did not undermine the holding in *Chambers* v. *Maroney*, 399 U.S. 42. Rather, as noted (*supra*, p. 10, n. 4), it distinguished *Chambers* on the ground, *inter alia*, that *Coolidge* involved an entry onto "private property to seize and search" the automobile (403 U.S. at 463, n. 20).

crime, under circumstances in which it was practically impossible to obtain a warrant prior to the stopping (or seizure) of the vehicle but *not* prior to its search. Here, the vehicle was seized on a public parking lot, but it is clear that probable cause had evolved in sufficient time to permit procurement of the warrant prior to the seizure. Whether the seizure of the vehicle must be invalidated for this reason alone is a question that has not been determined by any holding of this Court.[7] See generally Annotation, *Validity, Under Federal Constitution, of Warrantless Search of Automobile—Supreme Court Cases*, 26 L. Ed. 2d 893.

B. THE FUNDAMENTAL POLICY OF PROTECTION OF PRIVACY INTERESTS EMBODIED IN THE FOURTH AMENDMENT WOULD NOT BE MEANINGFULLY ENHANCED BY ADOPTION OF A WARRANT REQUIREMENT FOR PROBABLE CAUSE SEIZURES OF AUTOMOBILES

The crucial police conduct on which this case focuses is the warrantless seizure of respondent's automobile, which the courts below deemed *per se* unreasonable despite the existence of probable cause clearly sufficient to have justified issuance of a warrant. As we argue, the taking of the paint chips from the car should not be deemed a search, since it entailed no meaningful intrusion into respondent's zone of privacy (as distinct from his property interest); the proper focus of inquiry should be on the validity of the seizure. The

[7] While we accordingly do not suggest that *Chambers* is controlling here, that decision is highly pertinent because the analysis there employed in determining whether a warrant should have been obtained was not based on any *per se* rule, but rested on whether there was a significant additional intrusion that should necessitate the interposition of a magistrate.

seizure of respondent's automobile under the circumstances of this case did not impinge upon the legitimate desire for and expectation of privacy that this Court has found to be the core interest protected by the Fourth Amendment. It follows that, although the Fourth Amendment's protection of the citizen against government action is not confined to privacy interests, its values are sufficiently protected in cases such as this by the general reasonableness requirement, without the need for antecedent interposition of a magistrate between law enforcement officials and their actions to deprive the citizen of possessory interest in an automobile.

1. In addition to the holdings of this Court in automobile cases, respondent relies on the following general principle outlined in *Katz* v. *United States,* 389 U.S. 347, 357:

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States,* 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *." *Wong Sun* v. *United States,* 371 U.S. 471, 481–482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the

Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

An examination of the cases cited in *Katz*, however, shows the accuracy of the observation in *Coolidge* that this principle has gained general acceptance only in cases involving searches of individuals or homes, offices, hotel rooms and like areas,[8] where a substantial invasion of privacy is accomplished by a search which precedes the seizure of evidence. While *Katz* extended that principle to electronic surveillance not accompanied by a physical trespass, that determination was obviously influenced by the serious invasion of personal privacy involved in law enforcement through eavesdropping. Compare *United States* v. *Dionisio*, 410 U.S. 1, and *United States* v. *Mara*, 410 U.S. 19. Similar considerations govern searches of mail placed into the hands of postal authorities. *Ex parte Jackson*, 96 U.S. 727, 733.

[8] The cases cited in support of the *per se* rule in *Katz* were (389 U.S. at 357, n. 18): (1) *Jones* v. *United States*, 357 U.S. 493, 498, which held that if "federal officers [were] free to search without a warrant merely upon probable cause to believe that certain articles were *within a home*, the provisions of the Fourth Amendment would become empty phrases" (emphasis supplied); (2) *Chapman* v. *United States*, 365 U.S. 610, which held that a landlord could not authorize a warrantless entry into the apartment of his tenant; (3) *Stoner* v. *California*, 376 U.S. 483, 490, which held that "[n]o less than a tenant of a house, or occupant of a room in a boarding house * * *, a guest in a hotel room is entitled to [the] * * * protection against unreasonable searches and seizures." A fourth case, *Rios* v. *United States*, 364 U.S. 253, 261, involved a search and seizure of narcotics from a defendant who had been riding in a taxicab, where there was neither a warrant *nor* any showing of probable cause to justify the entry into the vehicle.

There are, however, no privacy interests at stake in this case. The temporary seizure of an automobile at most impinges upon the owner's proprietary interest in the vehicle; it does not override any substantial expectation of privacy he may have. While the Fourth Amendment protects more than just privacy from certain kinds of governmental intrusion, "and often ha[s] nothing to do with privacy at all" (*Katz* v. *United States, supra,* 389 U.S. at 350), "[t]he decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States,* 357 U.S. 493, 498.

When no such interest is at stake and when the conduct of law enforcement officers does not touch on interests which implicate "the essential purpose of the Fourth Amendment," there is no necessity to invoke the most stringent protections which the Fourth Amendment accords to significant invasions of privacy.

Particularly apposite in recognizing this distinction between invasions of privacy and invasions of proprietary interests is *Hester* v. *United States,* 265 U.S. 57. There, law enforcement officers trespassed on to private property and found evidence of the defendant's wrongdoing. In holding that the law enforcement officers did not violate the Fourth Amendment, Mr. Justice Holmes wrote as follows for a unanimous Court (265 U.S. at 58):

> It is obvious that even if there had been a trespass, the above testimony was not obtained

> by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. * * * The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

Similarly, in *United States* v. *Dionisio*, 410 U.S. 1, and *United States* v. *Mara*, 410 U.S. 19, it was held that the compulsory taking of handwriting exemplars, fingerprint samples and voiceprints was not limited by the Fourth Amendment because these acts involve " 'none of the probing into an individual's private life and thoughts that marks an interrogation or search'." (410 U.S. at 15). (This is, indeed, the only basis that appears to exist for the eminently sound distinction between "seizures" of voiceprints and electronic surveillance, which involves "seizures" of conversations.)

Most significant of all is the settled law, approved by implication by this Court in *Cooper* v. *California*, 386 U.S. 58, that warrantless seizures of vehicles used to transport contraband are valid if reasonable, without regard to whether a warrant could have been ob-

tained. Indeed, only eight months after it held that the law enforcement officers in this case had violated the Fourth Amendment, the Court of Appeals for the Sixth Circuit sustained (without reference to its decision in this case) the warrantless seizure of an unoccupied vehicle (parked on a public parking lot) based on probable cause to believe that it had been used to transport two counterfeit bills. *United States* v. *White*, No. 73-1301, decided December 13, 1973. The court of appeals held (slip op. at 3): "Existing authority supports the legal proposition that probable cause alone, without a warrant, is sufficient to justify the seizure of the automobile here in issue pursuant to 49 U.S.C. §§ 782 and 783."* Accord: *United States* v. *Stout*, 434 F. 2d 1264 (C.A. 10); *United States* v. *Francolino*, 367 F. 2d 1013, 1018-1023 (C.A. 2), certiorari denied, 386 U.S. 960; *Sirimarco* v. *United States*, 315 F. 2d 699, 701 (C.A. 10), certiorari denied, 374 U.S. 807; *United States* v. *Troiano*, 365 F. 2d 416, 418-419 (C.A. 3), certiorari denied, 385 U.S. 958; *United States* v. *Young*, 456 F. 2d 872, 875 (C.A. 8); *Lockett* v. *United States*, 390 F. 2d 168 (C. A. 9).

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*The court of appeals in *White*, relying on *Cooper* v. *California*, 386 U.S. 58, and *Cady* v. *Dombrowski*, 413 U.S. 433, then went on to uphold a search of the interior of the vehicle. Although it appears that there was not sufficient time to obtain a warrant to seize the vehicle in *White* prior to its discovery, there appear to have been no exigent circumstances precluding its procurement prior to seizure, and it seems plain that the holding did not turn on this fact. Indeed, *United States* v. *Troiano*, 365 F. 2d 416 (C.A. 3), cited with favor in *White*, was a case in which there was more than enough time to obtain a warrant.

This case, it is submitted, cannot reasonably be distinguished from the line of cases upon which the court of appeals relied in *White*. The forfeiture statute which authorized the warrantless seizure in *White* merely provides the legal justification for taking the vehicle, but it is conceded (and the holdings of the Ohio state courts confirm) that there was legal justification for seizing the vehicle here. The fact that there is some justification for seizing the vehicle thus does not resolve the issue of whether, regardless of the motive for seizure, the taking is to be deemed *per se* unreasonable absent a warrant or exigent circumstances.[10]

Realistically, therefore, the basis for sustaining the warrantless seizure of the vehicle in each case is the same—that the seizure alone does not impinge upon the fundamental values reflected by the Fourth Amendment. It is only a subsequent search of interior enclosed portions of the vehicle and packages or suitcases found therein that touches on those interests.[11] As the dissenters in *Cooper* v. *California*, 386 U.S. 58 (which involved the validity of a search of the vehicle after a warrantless seizure for forfeiture) stressed, "if [automobiles] can be searched without a warrant,

[10] We are frankly at a loss to understand how the court of appeals could apply more stringent requirements to police conduct in the course of the investigation of a brutal murder than it applies to essentially identical conduct motivated by a desire to enforce quasi-civil forfeiture laws.

[11] Although the law enforcement officers here examined the trunk of respondent's car, the validity of that conduct is not at issue. Even if that action were improper, it would not invalidate other lawful conduct. See *United States* v. *Artieri*, C.A. 2, No. 73-1771, decided January 23, 1974.

the precincts of the individual are invaded and the barriers to privacy breached" (386 U.S. at 65). Here, however, the seizure of the vehicle and the taking of paint samples did not "invade the precincts of the individual," nor did it "breach" the barriers to his privacy. Accordingly, the failure to obtain a warrant should not invalidate the taking of the paint samples.

2. Moreover, if this Court agrees with us that this case involves the validity only of a warrantless seizure, and that the taking of the paint samples did not constitute a search, the judgment of the court of appeals should be reversed even if the Court holds that a warrant is normally required for a seizure of an automobile. The State contended before the district court that respondent had consented to the seizure of his automobile by the police. There was conflicting evidence on this question, which was never resolved by the district court, because it viewed the taking of the paint sample as a search, and it found that the evidence "established, at most, that [respondent] consented to their taking custody of the car for safekeeping * * * [and not] for purposes of a search" (Pet. App. 54–55). Thus, if the Court concurs in our contention that the taking of the paint samples, which indisputably was amply justified by probable cause, was not itself *per se* unreasonable because done without a warrant (*i.e.*, that the investigators could have gone to the place where respondent's automobile was parked and removed a paint sample without a warrant), a showing of consent to police custody of the vehicle would suffice to sustain the lawfulness of the taking of the paint sample after the seizure.

C. THE HISTORY OF THE FOURTH AMENDMENT FULLY SUSTAINS THE VIEW THAT A WARRANT IS NOT ESSENTIAL TO THE VALIDITY OF AN OTHERWISE REASONABLE SEARCH AND SEIZURE OF A VEHICLE

Under the foregoing analysis, it would not be necessary for the Court, in deciding this case, to reach the more difficult general issue of the validity of warrantless searches of the interior of a vehicle. Should it be necessary to resolve this issue, however, it is our submission that, although such a search may involve some invasion of privacy, the extent of the invasion is ordinarily not such as to necessitate the interposition of a neutral and detached magistrate. The preceding discussion has shown that this issue has not been resolved by any holding of this Court. On the contrary, in those instances in which a warrant has been held necessary—none of which involved automobiles except *Coolidge*—the invasions of privacy were far more substantial than that present in a search of the interior of an automobile parked on a public street or entrusted to a bailee. We now show that neither the history nor the language of the Fourth Amendment sustain imposition of a *per se* warrant requirement for automobile searches, and that this view is in accord with English law.

1. The history and evolution of the Fourth Amendment has been well documented in the decisions of this Court [12] and in scholarly treatises,[13] and there is no

[12] See, *e.g.*, *Stanford* v. *Texas*, 379 U.S. 476, 481–485; *Marcus* v. *Search Warrant*, 367 U.S. 717, 724–729; *Frank* v. *Maryland*, 359 U.S. 360; *Harris* v. *United States*, 331 U.S. 145, 157–161 (dissent); *Boyd* v. *United States*, 116 U.S. 616, 624–629.

[13] Taylor, *Two Studies in Constitutional Interpretation*, pp. 3–46 (1969); Lasson, *History and Development of the Fourth Amendment of the United States Constitution*, pp. 13–105 (1937).

need to repeat this material at length here. Suffice it to say that the principal intent of the Framers (if not their only intent) was to bar forever the general warrants under which entries into the home were authorized without probable cause to believe that a crime had been committed or that evidence would be found. Such warrants were condemned by the English courts, and it was the intent of the Framers to write that condemnation into the Fourth Amendment. As Mr. Justice Stewart wrote for the Court in *Stanford* v. *Texas*, 379 U.S. 476, 481, 484 (emphasis added; footnotes omitted):

> These words [of the Fourth Amendment] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever "be secure in their persons, houses, papers, and effects" *from intrusion and seizure by officers acting under the unbridled authority of a general warrant.* Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer."
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> * * * * *

> * * * In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment, Lord Camden declared the [general] warrant to be unlawful. "This power," he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Entick* v. *Carrington* [19 How. St. Tr. 1029, 1064]. Thereafter, the House of Commons passed two resolutions condemning general warrants, the first limiting its condemnation to their use in cases of libel, and the second condemning their use generally.

The historical background is confirmed by the "legislative history" of the Fourth Amendment. In proposing the adoption of that provision, James Madison's statement to the House of Representatives directed its attention solely to the problem of general warrants:

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the discretion of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power,

there is like reason for restraining the Federal Government."[14]

Accordingly, the original draft of the Fourth Amendment, as revised in minor, stylistic particulars by the Committee of Eleven reflected only the concern about general warrants. It provided:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.[14a]

An amendment was then proposed by Representative Benson of New York (1 Annals of Congress, 1st Cong., 1st Sess., p. 754):

> Mr. Benson objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."
>
> The question was put on this motion, and lost by a considerable majority.

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[14] 1 Annals of Congress, 1st Cong., 1st Sess., p. 438. In a letter to George Eve written a few months earlier, Madison wrote:

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, etc. * * * [*Letters and Other Writings of James Madison*, Vol. 1, pp. 446–447 (1865)].

[14a] 1 Annals of Congress, *supra*, at p. 754.

As described by Lasson, *supra,* at pp. 101–102, the following then took place:

> [O]n August 24, when Benson as chairman of a Committee of Three, which had been appointed to arrange the amendments, reported an arrangement of the amendments as they were supposed to have been agreed upon by the House, the *clause appeared as he had proposed it and as the House had rejected it.*
>
> And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord. [Emphasis in original; footnotes omitted.]

While the language of the Fourth Amendment plainly affords protection against both unreasonable searches and seizures *and* the general warrants, there is no support for the view that the Framers intended that every search undertaken without a warrant would be *per se* unreasonable if a warrant could have been obtained. Quite the contrary—it may be inferred from legislation enacted by the very Congress which drafted the Bill of Rights, and by other early Congresses, that whether a warrant was necessary was dependent upon the nature of the invasion of privacy. As Chief Justice Taft observed in *Carroll* v. *United States, supra,* 267 U.S. at 150–152:

> It is noteworthy that the twenty-fourth section of the Act of 1789 [1 Stat. 29, 43] provides:

"That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

* * * * *

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same,

and the vehicle or beast as well, for trial and for forfeiture. * * *[15]

Although in *Carroll* Chief Justice Taft attributed the distinction drawn between houses and vehicles in the foregoing legislation (and in subsequent statutes enacted during the early years of the Republic), to the movability of vehicles and the consequent impracticability of obtaining a warrant (267 U.S. at 151, 153), that was not likely to have been the only explanation. Certainly the statutes permitted warrantless searches without regard to whether there was any reason to believe the vessel or vehicles would in fact be moved before a warrant could be obtained. Moreover, the statutes only required that there be "reason to suspect" that contraband would be found in the vehicles. The latter precondition—allowing searches on less than probable cause—could hardly be explained by the fact the vehicles were movable.[16]

[15] Moreover, the Act of March 3, 1815, contained the following proviso in Section 2:

Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat or other vehicle of whatever form or construction, employed as a medium of transportation, or to packages on any animal or animals, or carried by man on foot."

The 1815 statute bears marked similarities to the statute (8 U.S.C. 1357(a)(3)) at issue in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, differing principally in that it arguably required some suspicion to justify the stop and search. The President who signed the 1815 statute into law was, of course, James Madison.

[16] We do not suggest that an eighteenth or nineteenth century view of reasonableness ought to control today (see, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294), "[b]ut recognition of that reality does not liberate us from all historical restraint." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 256 (Powell, J., concurring). In other words, reversal of the court of appeals here would entail

The language and history of the Fourth Amendment, therefore, are entirely consistent with our submission that the necessity for a warrant should be determined on the basis of the nature of the privacy interests at stake and not by any *per se* rule that if a warrant could be obtained, then it must be obtained.

2. The foregoing discussion has shown that the Fourth Amendment was basically intended to reflect the English law of the time. And, indeed, the law of search and seizure in England—except for the absence of an inflexible exclusionary rule—has evolved in much the same manner as our own. See, *e.g.*, *King* v. *Reginam*, 1 A.C. 304, 2 All Eng. Rep. 610 (1968); *Chic Fashions, (West Wales) Ltd.* v. *Jones*, 2 Q.B. 299, 1 All Eng. Rep. 232 (1968). Indeed, it is if anything more stringent in some respects. See *Ghani* v. *Jones*, 1 Q.B. 693, 3 All Eng. Rep. 1700, 1702 (1969).

It is therefore of some relevance to observe that under English law today a search and seizure of the kind at issue here would be valid without a warrant. The standards for such a search and seizure were set out by Lord Denning, M.R., in *Ghani* v. *Jones*, *supra*, 3 All Eng. Rep. at 1705:

> *First*, The police officers must have reasonable grounds for believing that a serious offence has been committed—so serious that it

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no dilution of the requirements of probable cause to support a search or seizure; it merely would entail, with respect to the theory we present in this portion of our argument, a refusal to extend to automobiles the presumption of *per se* unreasonableness applied to warrantless searches of houses.

is of the first importance that the offenders should be caught and brought to justice.

Secondly. The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).

Thirdly. The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

Fourthly. The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

Finally. The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards."[17]

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[17] Although the opinion sets out these rules in the context of a case in which no arrest had yet taken place, it does not appear that this fact is critical except that a less stringent standard would presumably apply to a search incident to an arrest. See, *e.g.*, *Elias* v. *Pasmore*, 2 K.B. 164, 172 (1934).

The seizure and search here fully complied with these standards.

3. In conclusion, it should be noted that we are not suggesting that the reasonableness of an automobile search is always sustainable simply upon a showing of probable cause and that a warrant can never be required regardless of the surrounding circumstances. There may be circumstances in which important privacy interests are materially implicated and in which a strict warrant requirement ought to be imposed. But there is nothing remotely approaching such interests at stake here.

Moreover, we believe it is unlikely that adoption of our contentions would result in any increase in unlawful conduct by law enforcement officers, or that adoption of the contrary view is necessary for purposes of prophylaxis. The exclusionary rule remains applicable in full force to unreasonable automobile searches, and police continue to have substantial incentive to seek a warrant in any doubtful case, in view of this Court's announced policy of rewarding such action in evaluating close questions of probable cause. See *United States* v. *Ventresca*, 380 U.S. 102, 106.

CONCLUSION

The conduct of the law enforcement officers in seizing respondent's automobile without a warrant did not violate the Fourth Amendment because the seizure and the taking of samples did not involve substantial invasion of his privacy. Accordingly, it is respectfully

submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
EDWARD R. KORMAN,
Assistant to the Solicitor General.

MARCH 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CARDWELL, WARDEN *v.* LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1603. Argued March 18, 1974—Decided June 17, 1974.

On July 24, 1967, law enforcement officers interviewed respondent in connection with a murder that had occurred five days before and viewed his automobile, which was thought to have been used in the commission of the crime. On October 10, in response to a previous request, respondent appeared at 10 a. m. for questioning at the office of the investigating authorities, having left his car at a nearby public commercial parking lot. Though the police had secured a warrant for respondent's arrest at 8 a. m., respondent was not arrested until late in the afternoon, after which his car was towed to a police impoundment lot, where a warrantless examination the next day of the outside of the car revealed that a tire matched the cast of a tire impression made at the crime scene and that paint samples taken from respondent's car were not different from foreign paint on the fender of the victim's car. Respondent was tried and convicted of the murder, and his conviction was affirmed on appeal. In a subsequent habeas corpus proceeding the District Court concluded that the seizure and examination of respondent's car violated the Fourth and Fourteenth Amendments and that the evidence obtained therefrom should have been excluded at the trial. The Court of Appeals affirmed, concluding that the scraping of paint from the car's exterior was a search within the meaning of the Fourth Amendment; that the search, which was not incident to respondent's arrest, was unconsented; and that the car's seizure could not be justified on the ground that the car was an instrumentality of the crime in plain view. *Held:* The judgment is reversed. Pp. 4–

476 F. 2d 467, reversed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST, concluded that:

Syllabus

1. The examination of the exterior of respondent's automobile upon probable cause was reasonable and invaded no right of privacy that the requirement of a search warrant is meant to protect. Pp. 4–8.

(a) The primary object of the Fourth Amendment is the protection of privacy. *Warden* v. *Hayden*, 387 U. S. 294, 305–306. P. 5.

(b) Generally, less stringent warrant requirements are applied to vehicles than to homes or offices, *Carroll* v. *United States*, 267 U. S. 132; *Chambers* v. *Maroney*, 399 U. S. 42, and the search of a vehicle is less intrusive and implicates a lesser expectation of privacy. Pp. 5–7.

(c) The "search" in this case, concededly made on the basis of probable cause, infringed no expectation of privacy. Pp. 7–8.

2. Under the circumstances of this case the seizure by impounding the car was not unreasonable. Pp. 8–12.

(a) The vehicle was seized from a public place, where access was not meaningfully restricted. *Chambers* v. *Maroney*, 399 U. S. 42, followed; *Coolidge* v. *New Hampshire*, 403 U. S. 443, distinguished. Pp. 9–11.

(b) Exigent circumstances justifying a warrantless search of a vehicle are not limted to situations where probable cause is unforseeable and arises only at the time of arrest. Cf. *Chambers*, 399 U. S., at 50–51. P. 11.

MR. JUSTICE POWELL, being of the view that the inquiry of a federal court on habeas corpus review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant had an opportunity in the state courts to raise that claim and have it adjudicated fairly, would reverse the judgment of the Court of Appeals since respondent does not contend that he was denied that opportunity. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (POWELL, J., concurring). P. 1.

BLACKMUN, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in the result. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 72-1603

Harold J. Cardwell, Warden, Petitioner, v. Arthur Ben Lewis. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 17, 1974]

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion in which the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join.

This case presents the issue of the legality, under the Fourth and Fourteenth Amendments, of a warrantless seizure of an automobile and the examination of its exterior at a police impoundment area after the car had been removed from a public parking lot.

Evidence obtained upon this examination was introduced at the respondent's state court trial for first-degree murder. He was convicted. The Federal District Court, on a habeas application, ruled that the examination was a search violative of the Fourth and Fourteenth Amendments. 354 F. Supp. 26 (SD Ohio 1972). The United States Court of Appeals for the Sixth Circuit affirmed. 476 F. 2d 467 (1973). We granted certiorari, 414 U. S. 1062 (1973), and now conclude that, under the circumstances of this case, there was no violation of the protection afforded by the Amendments.

I

In 1968 respondent Arthur Ben Lewis, Jr., was tried and convicted by a jury in an Ohio state court for the first-degree murder of Paul Radcliffe. On appeal, the Supreme Court of Ohio affirmed the judgment of con-

viction. *State* v. *Lewis*, 22 Ohio St. 2d 125, 258 N. E. 2d 445 (1970). This Court denied review. *Lewis* v. *Ohio*, 400 U. S. 959 (1970).

On respondent's federal habeas application, the District Court, from the record and after an evidentiary hearing, adduced the following facts:

On the afternoon of July 19, 1967, Radcliffe's body was found near his car on the banks of the Olentangy River in Delaware County, Ohio. The car had gone over the embankment and had come to rest in brush. Radcliffe had died from shotgun wounds. Casts were made of tire tracks at the scene, and foreign paint scrapings were removed from the right rear fender of Radcliffe's automobile.

Within five days of Radcliffe's death, the investigation began to focus upon respondent Lewis. It was learned that Lewis knew Radcliffe. Lewis had been negotiating the sale of a business and had executed a contract of sale. The purchaser, Jack Smith, employed Radcliffe, an accountant, to examine Lewis' books. Police went to Lewis' place of business to question him and there observed the model and color of his car in the thought that it might have been used to push the Radcliffe vehicle over the embankment. Not until several months later, however, in late September, was Lewis again questioned. On October 9, he was asked to appear the next morning at the Office of the Division of Criminal Activities in Columbus for further interrogation.

On October 10, at 8 a. m., a warrant for respondent's arrest was obtained.[1] The District Court found that at

[1] The arrest warrant was obtained in Delaware County, where the crime was committed. The Activities Office is in adjacent Franklin County. In Ohio, an arrest warrant may be served in any county of the State. Ohio Rev. Code § 2491.36 (1953). In contrast, a search warrant in Ohio may be issued by a judge or magistrate only "within his jurisdiction." Ohio Rev. Code § 2933.21. Thus, a

this time, in addition to probable cause for the arrest, the police also had probable cause to believe that Lewis' car was used in the commission of the crime. An automobile similar to his had been observed leaving the scene; the color of his vehicle was similar to the color of the paint scrapings from the victim's car; in a telephone call to Mrs. Smith, made by a person who said he was Radcliffe, but proved not to be,[2] the caller made statements that, if true, would benefit only Lewis; he had had body repair work done on the grille, hood, right front fender, and other parts of his car on the day following the crime; and the victim's desk calendar for the day of his death showed the notation, "Call Ben Lewis."[3]

Respondent Lewis complied with the request to appear. He drove his car to the Activities Office, placed it in a public commercial parking lot a half block away, and arrived shortly after 10 a. m. Although the police were in possession of the arrest warrant for the entire period that Lewis was present, he was not served with that warrant or arrested until late that afternoon, at approximately 5 p. m. Two hours earlier, Lewis had been permitted to call his lawyer and two attorneys were present on his behalf in the Office at the time of the formal arrest. Upon the arrest, Lewis' car keys and the parking lot

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search warrant obtained in Delaware County is not valid in Franklin County.

[2] The call was made at about 9:30 a. m. on July 19 by a man who identified himself to Mrs. Smith as Radcliffe and who stated that the books were in "A–1 condition." Mrs. Smith, who knew the victim, did not identify the caller as Radcliffe. Gunshots were heard between 8 a. m. and 8:30 a. m. that day by two women who lived near the site of the crime. It thus became clear that someone had impersonated Radcliffe in making the telephone call.

[3] The calendar's page for July 19 was missing. Investigation disclosed a writing indentation, on the next and underlying page for July 20, which indicated what had been written on the page for July 19.

claim check were released to the police. A tow truck was dispatched to remove the car from the parking lot to the police impoundment lot.

The impounded car was examined the next day by a technician from the Ohio Bureau of Criminal Investigation. The tread of its right rear tire was found to match the cast of a tire impression made at the scene of the crime.[4] The technician testified that, in his opinion, the foreign paint on the fender of Radcliffe's car was not different from the paint samples taken from respondent's vehicle, that is, there was no difference in color, texture, or order of layering of the paint.

The District Court concluded that the seizure and examination of Lewis' car were violative of the Fourth and Fourteenth Amendments, and that the evidence obtained therefrom should have been excluded at the state court trial. The court, accordingly, issued a writ of habeas corpus requiring the State to "initiate action for a new trial of" respondent within 90 days or, in the alternative, to release him. 354 F. Supp., at 44. The Court of Appeals, in affirming, held that the scraping of paint from the exterior of Lewis' car was in fact a search, within the meaning of the Fourth Amendment; that there was no consent to that search; that it was not incident to Lewis' arrest; and that the seizure of the car could not be justified on the ground that the vehicle was an instrumentality of the crime in plain view.

II

This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search" that im-

[4] Apparently, the car's trunk was also opened and a tire in the trunk was observed. 354 F. Supp., at 33; 476 F. 2d, at 468. No evidence obtained from any part of the interior of the vehicle, however, was introduced.

plicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the *exterior* and an observation of the tread of a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect. This is an issue this Court has not previously addressed.

The common law notion that a warrant to search and seize is dependent upon the assertion of a superior government interest in property, see, *e. g.*, *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1066 (1765), and the proposition that a warrant is valid "only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it," *Gouled* v. *United States*, 255 U. S. 298, 309 (1921), were explicitly rejected as controlling Fourth Amendment considerations in *Warden* v. *Hayden*, 387 U. S. 924, 302–306 (1967). Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. *Id.*, at 305–306. And it had been said earlier, "The decisions of this Court have time and again underscored the purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States*, 357 U. S. 493, 498 (1958). See also *Schmerber* v. *California*, 384 U. S. 757, 769–770 (1966); *Katz* v. *United States*, 389 U. S. 347, 350 (1967); *United States* v. *Dionisio*, 410 U. S. 1, 14–15 (1973).

At least since *Carroll* v. *United States*, 267 U. S. 132 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less strin-

gent warrant requirements have been applied to vehicles. In *Chambers* v. *Maroney*, 399 U. S. 42, 49 (1970), the Court chronicled the development of car searches and seizures.[5] An underlying factor in the *Carroll-Chambers* line of decisions has been the exigent circumstances that exist in connection with movable vehicles. "[T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since the car is readily movable." *Chambers* v. *Maroney*, 399 U. S., at 50–51. This is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened.

There is still another distinguishing factor. "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are

[5] The Court there discussed the following post-*Carroll* cases: *Husty* v. *United States*, 282 U. S. 694 (1931); *Scher* v. *United States*, 305 U. S. 251 (1938); *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Preston* v. *United States*, 376 U. S. 364 (1964); *Cooper* v. *California*, 386 U. S. 58 (1967); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968). Cases decided since *Chambers* and that now might be added to the list include *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Cady* v. *Dombrowski*, 413 U. S. 433 (1973). See also *Harris* v. *United States*, 390 U. S. 234 (1968); Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835 (1974).

in plain view. See *People* v. *Case*, 220 Mich. 379, 388–389, 190 N. W. 2d 289, 292 (1922). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U. S., at 351; *United States* v. *Dionisio*, 410 U. S., at 14. This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.

In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence.[6] With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed.[7] Stated

[6] Petitioner contends that Lewis' car keys and the parking lot claim check were seized in plain view as an incident to his arrest, and that this seizure served to transfer constructive possession of the vehicle which could then be searched and seized as an instrumentality of the crime. We feel that the District Court and the Court of Appeals were correct in rejecting this argument. Irrespective of the plain view or instrumentality analyses, the concept of constructive possession has not been found to justify the search or seizure of an item not in actual possession.

[7] As has been noted, the arrest was made at the Office of the Division of Criminal Activities; but the examination of the vehicle took place some time later at the police impoundment lot. This difference in time and place eliminates any search-incident-to-an-arrest contention.

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the

simply, the invasion of privacy, "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, — U. S. —, — (1974). Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments.[8]

Here, it has been established and is conceded that the police had probable cause to search Lewis' car. An automobile similar in color and model to his car had been seen leaving the scene of the crime. This similarity was corroborated by comparison of the paint scrapings taken from the victim's car with the color and paint of Lewis' automobile. Lewis had had repair work done on his car immediately following the death of the victim. And he had a nexus with Radcliffe on the day of death. All this provided reason to believe that the car was used in the commission of the crime for which Lewis was arrested. *Cooper* v. *California*, 386 U. S. 58, 61 (1967).

III

Concluding, as we have, that the examination of the exterior of the vehicle upon probable cause was reason-

need to prevent the destruction of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston* v. *United States*, 376 U. S. 364, 367 (1964):

See also *Chambers* v. *Maroney*, 399 U. S., at 47.

[8] Again, we are not confronted with any issue as to the propriety of a search of a car's interior. "Neither *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Chambers* v. *Maroney*, 399 U. S., at 50.

able, we have yet to determine whether the prior impoundment of the automobile rendered that examination a violation of the Fourth and Fourteenth Amendments. We do not think that, because the police impounded the car prior to the examination, which they could have made on the spot, there is a constitutional barrier to the use of the evidence obtained thereby. Under the circumstances of this case, the seizure itself was not unreasonable.

Respondent asserts that this case is indistinguishable from *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). We do not agree. The present case differs from *Coolidge* both in the scope of the search [*] and in the circumstances of the seizure. Since the Coolidge car was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property. Here, as in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), the automobile was seized from a public place where access was not meaningfully restricted. This is, in fact, the ground upon which the *Coolidge* plurality opinion distinguished *Chambers*, 403 U. S., at 463 n. 20. See also *Cady* v. *Dombrowski*, 413 U. S., at 446–447.

In considering whether the lack of a warrant to seize a vehicle invalidates the otherwise legal examination of the car, *Chambers* is highly pertinent. In *Chambers*, four men in an automible were arrested shortly after an armed robbery. The Court concluded that there was probable cause to arrest and probable cause to search the vehicle. The car was taken from the highway to

[*] *Coolidge* concerned a thorough and extensive search of the entire automobile including the interior from which, by vacuum sweepings, incriminating evidence was obtained. A search of that kind raises different and additional considerations not present in the examination of a tire on an operative wheel and in the taking of exterior paint samples from the vehicle in the present case for which there was no reasonable expectation of privacy.

the police station where, some time later, a search producing incriminating evidence, was conducted. We stated:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment . . . . The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." 399 U. S., at 52.

The fact that the car in *Chambers* was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance.[10] The same arguments and considerations of exigency, immobilization on the spot, and posting a guard obtain. In fact, because the interrogation session

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[10] Before the District Court, the State argued that Lewis had consented to the seizure of his car by requesting that the police impound it for safekeeping. The District Court stated,

"Viewing the evidence in the light most favorable to the State, petitioner [Lewis] did not clearly and unequivocally consent to the seizure and search of the automobile. The testimony . . . established, at most, that petitioner consented to their taking custody of the car for safekeeping. There is no evidence that petitioner consented, expressly or impliedly, to a seizure of the automobile for purposes of a search." 354 F. Supp., at 37–38.

Inasmuch as we hold the seizure to be justified under *Chambers*, we do not reach the issue of Lewis' consent.

ended with awareness that Lewis had been arrested and that his car constituted incriminating evidence, the incentive and potential for the car's removal substantially increased. There was testimony at the federal hearing that Lewis asked one of his attorneys to see that his wife and family got the car, and that the attorney relinquished the keys to the police in order to avoid a physical confrontation. 356 F. Supp., at 33. In *Chambers*, all occupants of the car were in custody and there were no means of relating this fact or the location of the car (if it had not been impounded) to a friend or confederate. *Chambers* also stated that a search of the car on the spot was impractical because it was dark and the search could not be carefully executed. 399 U. S., at 52 n. 10. Here too, the seizure facilitated the type of close examination necessary.[11]

Respondent contends that here, unlike *Chambers*, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. *Chambers*, 399 U. S., at 50–51. The exigency may arise at any time, and the fact that the police might have ob-

[11] To make a comparison with a paint scraping required that a section of the painted exterior that had not been recently repaired be sampled. This conceivably could necessitate several scrapings if the first sample was not conclusive after laboratory analysis. Similarly, to make a cast of the tire tread on the operative wheel would require laboratory equipment.

tained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.[12]

The judgment of the Court of Appeals is reversed.

It is so ordered.

[12] We do not address the question found to be determinative in MR. JUSTICE POWELL's concurring opinion. This question was not raised or briefed by the parties.

SUPREME COURT OF THE UNITED STATES

No. 72–1603

Harold J. Cardwell, Warden, Petitioner, *v.* Arthur Ben Lewis. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 17, 1974]

MR. JUSTICE POWELL, concurring in the result.

I would reverse the judgment of the Court of Appeals for the reasons set forth in my concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (1973). As stated therein, I would hold that "federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts." *Id.*, at 250. In this case there is no contention that petitioner was denied a full and fair opportunity to litigate his claim in the state courts.

SUPREME COURT OF THE UNITED STATES

No. 72–1603

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[June 17, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The most fundamental rule in this area of constitutional law is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455. See also *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529. Since there was no warrant authorizing the search and seizure in this case, and since none of the "specifically established and well-delineated exceptions" to the warrant requirement here existed, I am convinced the judgment of the Court of Appeals must be affirmed.[1]

In casting about for some way to avoid the impact of our previous decisions, the plurality opinion first suggests, *ante*, at 4–5, that no "search" really took place in this case, since all that the police did was to scrape paint from the respondent's car and make observations of its

[1] This dissent is directed toward the search-and-seizure analysis in MR. JUSTICE BLACKMUN's plurality opinion. Like the plurality, I do not consider the issue raised by MR. JUSTICE POWELL's concurrence, it having been neither briefed nor argued by the parties.

tires. Whatever merit this argument might possess in the abstract, it is irrelevant in the circumstances disclosed by this record. The argument is irrelevant for the simple reason that the police, before taking the paint scrapings and looking at the tires, first took possession of the car itself. The Fourth and Fourteenth Amendments protect against "unreasonable searches and *seizures*," and there most assuredly was a seizure here.

The plurality opinion next seems to suggest that the basic constitutional rule can be overlooked in this case because the subject of the seizure was an automobile. It is true, of course, that a line of decisions, beginning with *Carroll* v. *United States*, 267 U. S. 132, have recognized a so-called "automobile exception" to the constitutional requirement of a warrant. But "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge*, *supra*, at 461–462. Rather, the *Carroll* doctrine simply recognizes the obvious—that a *moving* automobile on the open road presents a situation "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll*, *supra*, at 153. See also *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 269. Where there is no reasonable likelihood that the automobile would or could be moved, the *Carroll* doctrine is simply inapplicable. See, *e. g.*, *Coolidge*, *supra*; *Preston* v. *United States*, 376 U. S. 364.

The facts of this case make clear beyond peradventure that the "automobile exception" is not available to uphold the warrantless seizure of the respondent's car. Well before the time that the automobile was seized, the respondent—and the keys to his car—were securely within police custody. There was thus absolutely no likelihood that the respondent could have either moved

the car or meddled with it during the time necessary to obtain a search warrant. And there was no realistic possibility that anyone else was in a position to do so either. I am at a loss, therefore, to understand the plurality opinion's conclusion, *ante*, at 11, that there was a "potential for the car's removal" during the period immediately preceding the car's seizure. The facts of record can only support a diametrically opposite conclusion.

Finally, the plurality opinion suggests that other "exigent circumstances" might have excused the failure of the police to procure a warrant. The opinion nowhere states what these mystical exigencies might have been, and counsel for the petitioner has not been so inventive as to suggest any.[2] Since the authorities had taken care to procure an arrest warrant even before the respondent arrived for questioning, it can scarcely be said that probable cause was not discovered until so late a point in time as to prevent the obtaining of a warrant for seizure of the automobile. And, with the automobile effectively immobilized during the period of the respondent's interrogation, the fear that evidence might be destroyed was hardly an exigency, particularly when it is remembered that no such fear prompted a seizure during all the preceding months whole the defendant, though under investigation, had been in full control of the car.[3] This

[2] Even the Solicitor General, who appeared as *amicus curiae* urging a reversal of the Court of Appeals' judgment in this case, has candidly admitted in his brief that "no satisfactory reason appears for the failure of the law enforcement officers to have obtained a warrant—there appears on the facts of this case to have been no real likelihood that respondent would have destroyed or concealed the evidence during the time required to seek and procure a warrant."

[3] It can hardly be argued that the questioning of the respondent by the police for the first time alerted him to their intentions, thus suddenly providing him a motivation to remove the car from "official grasp." *Ante*, at 6, 10–11. Even putting to one side the question of how the respondent could have acted to destroy any evidence

is, quite simply, a case where no exigent circumstances existed.[4]

Until today it has been clear that "[n]either *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Chambers* v. *Maroney*, 399 U. S. 42, 50. I would follow the settled constitutional law established in our decisions and affirm the judgment of the Court of Appeals.

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while he was in police custody, the fact is that he was fully aware of official suspicion during several months preceding the interrogation. He had been questioned on several occasions prior to his arrest, and he had been alerted on the day before the interrogation that the police wished to see him. Nonetheless, he voluntarily drove his car to Columbus to keep his appointment with the investigators.

[4] The plurality opinion correctly rejects, *ante*, at 7, n. 7, the petitioner's contention that the seizure here was incident to the arrest of the respondent. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston* v. *United States*, 376 U. S. 364, 367.

END OF CASE